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EDITED BY  
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LONDON :  
BUTTERWORTH & CO., 11 & 12, BELL YARD, TEMPLE BAR.  
Law Publishers.

1910.

BRADBURY, AGNEW, & CO. LD., PRINTERS,  
LONDON AND TONBRIDGE.

## PUBLISHERS' ANNOUNCEMENT.

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THIS Volume, which forms the Second Annual Supplement to BUTTERWORTHS' TEN YEARS' DIGEST, is arranged on the same system of classification as is adopted in that Work. The skeleton of subject headings which appeared in the larger work has not been altered in any particular. The cases for the year 1909 have been fitted in the same scheme of titles and subtitles; and those instances have been clearly indicated where no cases have been decided relating to certain titles or subtitles. The elaborate and time-saving system of cross-references which appeared for the first time in the Work mentioned above has been employed in the present Volume. The Case Law for the year 1909 is fully covered therein, and the Volume has been in every way designed to form a Supplement which can be used expeditiously and satisfactorily in conjunction with the TEN YEARS' DIGEST.

The Cases reported in all the following series of Reports have been digested and incorporated in the present Volume.

Law Reports.	Registration Cases.
Law Journal Reports.	Cox's Criminal Law Cases.
Justice of the Peace.	Local Government Reports.
Law Times Reports.	O'Malley and Hardcastle's Election Petition Reports.
Times Law Reports.	M'Namara's Railway and Canal Cases.
Solicitors' Journal.	Irish Reports.
Commercial Cases.	Court of Session Cases.
Maritime Law Cases.	Scottish Law Reporter.
Bankruptcy and Company Cases.	
Patent, Design, Trade Mark and other Cases.	

In addition to including the cases appearing in the above Reports, a large number of important cases have been included which are only reported in the following newspapers and legal journals: *The Times*, *Law Times*, *Solicitors' Journal*, *Justice of the Peace*, and *Weekly Notes*.





## PREFACE.

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IN the preparation of this Second Annual Supplement to BUTTERWORTHS' TEN YEARS' DIGEST the general scheme of classification on which that Digest was based has again been followed throughout. In a very few instances it has been found advisable to add a new sub-heading or to extend the scope of an old one by a small verbal alteration. For example, two or three new sub-headings have been inserted under the title "Master and Servant." But it will be remembered that the Workmen's Compensation Act, 1906, had been in force but a short time when the TEN YEARS' DIGEST was published, and cases, without precedent, arising out of the provisions of that Act had not then been decided. Such new sub-headings rendered necessary by the effect of fresh legislation, will not, it is believed, affect the utility of the classification already adopted, since they are merely added or fitted into the former framework with a view to keeping the Digest up-to-date, and facilitating reference.

To avoid inconvenience many decisions have been, where possible, divided or repeated under different headings. But attention has been paid to a request for more numerous cross-references and it is hoped that in the present Volume they will be found sufficient. In this connection it may be useful to point out that where a number appears after a reference, the reader is referred to a case in the present Volume, but where no number appears, either the reference is a general one calling attention to a cognate heading under a title where a case sought for may be found, or the reference is, as it were, a strand in the whole fabric of cross-reference on which the TEN YEARS' DIGEST and its continuations have been planned.

The Editor thanks those who have made suggestions or pointed out errors during the Quarterly growth of this Volume,

and trusts that the valuable suggestions will be found to have been followed.

In conclusion, it is desired to acknowledge the permission courteously given in connection with the "Session Cases" and "The Scottish Law Reporter," and to thank the Publishers and Editors for such permission.

HARRY CLOVER.

1, HARE COURT,  
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*January 20, 1910.*



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\* A selection only of these cases is included.



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### I ACTIO PERSONALIS, etc.

See PRACTICE, No. 9.

### II. MAINTENANCE AND CHAMPERTY.

1. *Maintenance—Common Interest—Master and Servant—Action for Slander—Costs as between Solicitor and Client.*]

HELD—that the defendant society had not an interest in maintaining an action for slander by one of their inspectors where the action was really brought for their own purposes and they knew after the action had been commenced that the inspector was unfit to be continued in their service as an inspector.

HELD ALSO—that the plaintiff was entitled to recover from the defendants her costs as

between solicitor and client in defending the action for slander brought against her, and also her costs as between solicitor and client in an appeal in certain bastardy proceedings taken by her against the inspector.

SCOTT v. NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN AND PARR, 25 T. L. R. 789—Bray, J.

### III. GENERAL.

2. *Jurisdiction—Colonial Rates—Private Street Works—Right to Recover Cost in English Court.*—An action by a colonial municipality to recover a rate levied by them for street improvements pursuant to an Act of a colonial Legislature is not maintainable in the English Courts.

SYDNEY MUNICIPAL COUNCIL v. BULL, [1909] 1 K. B. 7; 78 L. J. K. B. 45; 99 L. T. 805; 25 T. L. R. 6—Grantham, J.

## ACTION IN PERSONAM.

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## ACTION IN REM.

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## ADJOINING OWNERS.

See BOUNDARIES AND FENCES; EASEMENTS; HIGHWAYS; METROPOLIS; MINES, MINERALS AND QUARRIES; WATERS AND WATERCOURSES.

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See also CONFLICT OF LAWS; SHIPPING AND NAVIGATION.

### I. HIGH COURT.

#### (a) Actions in Personam.

1. *Remoteness of Damage—Collision Causing Death of Master—Payment of Compensation to Widow under Workmen's Compensation Act, 1906—Right to Recover from Owner of Ship in Fault.*—Two vessels, the *Julia* and the *Annie*, collided, the *Annie* being alone to blame. The master of the *Julia*, in endeavouring to cut the painter of his boat when the collision occurred, was jerked into the river and was drowned, and his widow recovered from the owner of the *Julia*, in respect thereof, the sum of £300 as compensation under the Workmen's Compensation Act, 1906. The owner of the *Julia* brought an action *in personam* in the Admiralty Division against the owners of the *Annie* to recover as damages the amount he had so paid under the Workmen's Compensation Act, 1906.

HELD—that the damages claimed were not too remote and were recoverable.

THE ANNIE, 100 L. T. 415; 25 T. L. R. 416; [11 Asp. M. C. 213—Deane, J.]

#### (b) Actions in Rem.

See DEPENDENCIES, No. 18; SHIPPING AND NAVIGATION.

#### (c) Limitation of Liability.

See also SHIPPING AND NAVIGATION, XI (b).

2. *Owners' Actual Fault or Privity—Agent or Servant—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 59, 503.*—Sect. 503 of the Merchant Shipping Act, 1894, which enables the owner of a ship to limit his liability for loss or damage where it has occurred without his "actual fault or privity," refers to the actual fault or privity of the owner himself, and not to that of

his agent or servant. In the case of a ship owned by a railway company the "owners" are the general body of shareholders, and not the person who is registered under sect. 59 of the Act as managing owner or ship's husband.

THE YARMOUTH, [1909] P. 293; 25 T. L. R. 746 [—Deane, J.]

#### (d) Salvage Action.

3. *Practice—Pleading—Admission of Facts—Denial of Inferences—Right of Plaintiffs to give Evidence at Trial—Amendment of Claim.*—Several actions to recover salvage for services rendered were brought against the owners of the *Buteshire*, her cargo and freight, by the owners and crews of eight tugs and two lifeboats. After the various plaintiffs had delivered statements of claim an order was made consolidating the suits. The owners of the salvaged property then delivered a defence in the consolidated suit in which they admitted "the facts alleged in the various statements of claim, but not the inferences sought to be drawn from the said facts," and they submitted "themselves to the judgment of the Court thereon." The plaintiffs then had discovery of the defendants' log-books. On the hearing of the consolidated suit, counsel for some of the plaintiffs tendered the log-book of the defendants' vessel as evidence of the inference to be drawn from the facts; counsel for other plaintiffs applied for leave to amend the claim on behalf of the party for whom he appeared on the ground that the log-book disclosed a material fact which the plaintiffs could not have known when the claim was delivered.

HELD—that the plaintiffs were not entitled to call evidence or put in documents in support of their case as the facts pleaded by them were admitted, and that no amendment could be allowed at the trial, as the application should have been made before trial after discovery had been obtained.

THE BUTESHIRE, [1909] P. 170; 78 L. J. P. [108; 100 L. T. 1005—Deane, J.]

#### (e) In General.

4. *Evidence taken on Commission—Practice.*—Observations by Bigham, Pres., as to taking evidence on commission and as to attempts to be made in future to avoid, wherever possible, the expense of such commissions.

THE AUGUSTA, [1909] W. N. 239; 26 T. L. R. [98—Bigham, Pres.]

### II. COUNTY COURTS.

#### (a) Actions in Personam.

[No paragraphs in this vol. of the Digest.]

#### (b) Actions in Rem.

[No paragraphs in this vol. of the Digest.]

#### (c) Appeal.

[No paragraphs in this vol. of the Digest.]

#### (d) Transfer of Action.

[No paragraphs in this vol. of the Digest.]

#### (e) In General.

[No paragraphs in this vol. of the Digest.]

## ADMISSIBILITY OF EVIDENCE.

*See* EVIDENCE.

## ADMISSIONS.

*See* CRIMINAL LAW ; EVIDENCE ; PRACTICE.

## ADOPTION.

*See* BASTARDY ; INFANTS.

## ADULTERATION.

*See* AGRICULTURE ; FOOD AND DRUGS.

## ADULTERY.

*See* HUSBAND AND WIFE.

## ADVERTISEMENTS.

*See* CONTRACTS ; CRIMINAL LAW AND PROCEDURE ; GAMING AND WAGERING.

## AFFIDAVIT.

*See* EVIDENCE ; PRACTICE.

## AFFILIATION.

*See* BASTARDY.

## AGENCY.

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*See also* AUCTIONS AND AUCTIONEERS ; BILLS OF EXCHANGE ; HUSBAND AND WIFE ; INSURANCE ; LIBEL, No. 3 ; MASTER AND SERVANT ; SALE OF GOODS, No. 6 ; STOCK EXCHANGE ; TRADE AND TRADE UNIONS, No. 16.

### I. IN GENERAL.

1. *Broker—Charter-party—Partiesto Contract—Broker Signing as Agent—Suing as Principal.*—The plaintiffs, a firm of shipbrokers, on February 3rd, 1908, entered into a contract in charter-party form with the defendants, a firm of timber merchants, for the carriage of a cargo of timber in June, the freight to be paid being £1 1s. 6d. per standard. The plaintiffs signed the contract "by authority of and as agents for owners." In fact, the plaintiffs at that time had no principals, nor had they entered into any agreement for a ship to fulfil the contract. In May the plaintiffs entered into a charter with the owners of a steamer to carry the cargo of timber at a freight of £1 per standard, and they signed this charter as "agents for merchants," and in the body of it inserted the name of the defendants as charterers, whereas, in fact, they were not acting as agents for the defendants and made no contract between the defendants and the owners of the steamer. Bills of lading were signed reserving freight in accordance with the latter charter. The defendants paid the freight due under the bills of lading, and the plaintiffs sued them for the difference between that rate of freight and that due under the contract of February 3rd.

**HELD**—that as the plaintiffs in February, 1908, had no principals and were in fact contracting for themselves, they were entitled to sue on the contract of February 3rd, and that the defendants were liable for the freight reserved by that contract.

H. G. HARPER & CO. v. VIGERS BROS., [1909]  
[2 K. B. 549; 78 L. J. K. B. 876; 100 L. T. 887; 25 T. L. R. 627; 53 Sol. Jo. 780; 14 Com. Cas. 213—Pickford, J.]

### II. AUTHORITY OF AGENT.

2. *Excess of Authority—Lease—Specific Performance.*—It is not every excess of authority by an agent that will vitiate a contract, and where such excess by a lessor's agent is not unreasonable it will not operate to prevent specific performance of the contract.

BROMET v. NEVILLE, 53 Sol. Jo. 321—Eve, J.

3. *"Mercantile Agent"—Authority to Pledge—Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 1, 2.*—An agent who is entrusted with goods for sale or return on the terms that the goods are not to become his property or be mixed with his stock and that his remuneration shall consist of one half of the profits on the sale of the goods is a

## II. Authority of Agent—Continued.

mercantile agent within the Factors Act, 1889, and has, accordingly, authority to pledge the goods, though he may be at the same time carrying on an independent business as a dealer in such goods.

*Hastings v. Pearson*, ([1893] 1 Q. B. 62) overruled.

*WEINER v. HARRIS*, [1909] W. N. 234; 101 [L. T. 647; 26 T. L. R. 96; 54 Sol. Jo. 81]—C. A.

**4. Innocent Misrepresentation of Authority—Authority Ceasing without Agent's Knowledge—Liability of Agent.**—The liability of the person who professes to act as agent arises (a) if he has been fraudulent; (b) if he has without fraud untruly represented that he had authority when he had not; and (c) also where he innocently misrepresents that he has authority where the fact is either (1) that he never had authority or (2) that his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge. Such last-mentioned liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not.

*Smout v. Ulberg* (10 M. & W. 1) can no longer be regarded as law, if and so far as it decides that an agent continuing to act without knowledge of the revocation of his authority is not under liability to the other party for his warranty or representation of authority.

*YONGE v. TOYNBEE*, *Times*, December 28th, 1909 [—C. A.]

## III. COMMISSION.

### (a) When payable.

[No paragraphs in this vol. of the Digest.]

### (b) Secret Commissions, etc.

See SOLICITORS, No. 19; STOCK EXCHANGE, No. 2.

## IV. LIABILITY OF AGENT.

See No. 4, *supra*.

## V. LIABILITY OF PRINCIPAL.

See also WATERS AND WATERCOURSES, No. 1.

**5. Assignee for Creditors of Trader—Goods Ordered by Trader—Personal Liability of Assignee.**—By a deed entered into between one G., a trader, and the defendant, G. assigned to the defendant all his business, goodwill, and stock-in-trade, and the defendant was to carry on and manage the business, and after payment of the expenses thereby incurred and paying for goods supplied by creditors who were willing to supply goods for the purpose of the business and to look to the assets in the hands of the trustee for payment, he was to pay and divide the residue amongst the trade creditors whose names were set out in the schedule to the deed, and to pay any surplus to G. Six creditors of G. assented to the deed. No change was made in

the name of the business or in the way in which it was carried on, and G., who was paid a salary, continued to manage it and to give the orders. Subsequently, the plaintiffs, who were not creditors of G. at the time the deed was executed by him, supplied goods on the orders of G. for the purpose of the business, giving credit to G. The goods not having been paid for, the plaintiffs claimed to recover the price from the defendant.

**HELD**—that as the business had been assigned to the defendant, he was personally liable to pay for the goods.

*G. B. NICHOLLS & Co. v. KNAPMAN*, 26 T. L. R. [72—Lord Alverstone, C.J.]

**6. Limited Authority—Holding out—Acts of Particular Class.**—If an agent be held out as having only a limited authority to do, on behalf of his principal, acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because, the authority being thus represented to be limited, the party prejudiced has notice and should ascertain whether or not the act is authorised.

*RUSSO-CHINESE BANK v. LI YAU SAM*, *Times*, [December 28th, 1909—P. C.]

## VI. POWERS OF ATTORNEY.

See WILLS, No. 38.

## VII. RATIFICATION.

[No paragraphs in this vol. of the Digest.]

## AGREEMENT.

See CONTRACTS: LANDLORD AND TENANT, ETC.

## AGRICULTURE.

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For ACCIDENTS TO AGRICULTURAL LABOURERS, see MASTER AND SERVANT.

### I. AGRICULTURAL HOLDINGS.

**1. Small Holdings—Compulsory Acquisition—Order of County Council—Confirmation by Board of Agriculture and Fisheries—Appeal—Small Holdings and Allotments Act, 1908** (8 Edw. 7, c. 36), ss. 7, 39, *subss.* 3; s. 11.]—An order of a county council for the compulsory acquisition of land under the Small Holdings and Allotments Act, 1908, which has been confirmed by the



**I. Agricultural Holdings—Continued.**

Board of Agriculture and Fisheries, is final, and is not subject to review by the Court of King's Bench.

EX PARTE RINGER, 73 J. P. 436; 25 T. L. R. [718; 53 Sol. Jo. 745; 7 L. G. R. 1041—Div. Ct.

**II. CUSTOM OF THE COUNTRY.**

[No paragraphs in this vol. of the Digest.]

**III. FERTILIZERS AND FEEDING STUFFS.**

2. *Incorrect Invoice*—*Mens rea*—*Sharps*—*Fertilizers and Feeding Stuffs Act, 1906* (6 Edw. 7, c. 27), ss. 1, 6.]—A vendor of fertilizers and feeding stuffs who delivers an invoice therewith which purports to comply with sect. 1 of the Fertilizers and Feeding Stuffs Act, 1906, but is in fact incorrect, does not commit an offence against sect. 6, sub-sect. 1 (a), of the Act. In such a case his offence (if any) is against sect. 6, sub-sect. 1 (b).

Whether *mens rea* is a necessary element of the offence created by sect. 6, sub-sect. 1 (b), *quære*. Whether "sharps" come within sect. 1 or sect. 6, *quære*.

NEEDHAM & CO., LD. *v.* WORCESTERSHIRE [COUNTY COUNCIL, 100 L. T. 901; 73 J. P. 293; 25 T. L. R. 471; 7 L. G. R. 595—Div. Ct.

3. *Possession of Fertilizer—Carriers—Resisting Official Sampler—Fertilizers and Feeding Stuffs Act, 1906* (6 Edw. 7, c. 27), s. 8 (a).]—Persons being in possession of a fertilizer solely as carriers are persons entrusted for the time being with its charge or custody within the meaning of sect. 8 (a) of the Fertilizers and Feeding Stuffs Act, 1906, and commit an offence against the section in refusing to allow an official sampler to take a sample of the fertilizer.

DEPARTMENT OF AGRICULTURE AND TECHNICAL INSTRUCTION FOR IRELAND *v.* CORK STEAM PACKET CO., [1909] 2 I. R. 479—Div. Ct., Ireland.

**IV. MARKET GARDENS.**

[No paragraphs in this vol. of the Digest.]

**AIR.**

*See* EASEMENTS.

**ALE AND BEER.**

*See* INTOXICATING LIQUORS.

**ALIENATION, RESTRAINTS ON.**

*See* PERPETUITIES; SETTLEMENTS; TRUSTS.

**ALIENS.****I. RIGHT TO SUE.**

[No paragraphs in this vol. of the Digest.]

**II. EXPULSION ORDER.**

[No paragraphs in this vol. of the Digest.]

**III. IN GENERAL.**

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**ALIMONY.**

*See* HUSBAND AND WIFE.

**ALLEGIANCE.**

*See* ALIENS.

**ALLOTMENTS.**

*See* SMALL HOLDINGS AND ALLOTMENTS

**ALLUVION.**

*See* WATERS AND WATERCOURSES.

**ALTERATION OF DOCUMENTS.**

*See* BANKERS AND BANKING; BILLS OF EXCHANGE; DEEDS AND OTHER DOCUMENTS; WILLS.

**AMUSEMENTS.**

*See* THEATRES, ETC.

**ANCIENT LIGHTS.**

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**ANIMALS.**

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**1. CRUELTY TO ANIMALS.**

1. *Ill-treating, Abusing, and Torturing—Separate Offences—Form of Information—Summary*



### I. Cruelty to Animals—Continued.

*Jurisdiction Act*, 1848 (11 & 12 Vict. c. 43), s. 10—*Cruelty to Animals Act*, 1849 (12 & 13 Vict. c. 92), s. 2.]—Sect. 2 of the *Cruelty to Animals Act*, 1849, provides that "if any person shall . . . cruelly beat, ill-treat, abuse or torture . . . any animal" he shall be liable to a penalty.

An information was preferred against the respondent under the *Cruelty to Animals Act*, 1849, s. 2, for cruelly ill-treating, abusing, and torturing a grey gelding. The justices were of opinion that as the word "and" connected the words "abuse" and "torture" in the information, it was an information for three offences, and they put the appellant to his election on which of the charges he would proceed. The appellant declined to elect, and the justices thereupon dismissed the information.

HELD—that the words "abuse" and "torture" created separate offences and that the justices were, in the circumstances, right in refusing to convict, as sect. 10 of the *Summary Jurisdiction Act*, 1848, requires that every information shall be for one offence only.

JOHNSON v. NEEDHAM, [1909] 1 K. B. 626; 78 [L. J. K. B. 412; 100 L. T. 493; 73 J. P. 117; 25 T. L. R. 245—Div. Ct.

2. *One Summons Charging Cruelty to Four Animals—Four Convictions—Cruelty to Animals Act*, 1849 (12 & 13 Vict. c. 92).]—The defendant was charged in one summons under the *Cruelty to Animals Act*, 1849, with cruelly ill-treating four ponies by having between March 20th and April 6th, 1909, supplied them with unsuitable food. He was not informed when he appeared that he had to answer more than one charge, nor did he know till the justices, after having heard the case, returned into Court that he was to be convicted of more than one offence. The justices having convicted the defendant of an offence in respect of each of the four ponies, and imposed a fine in respect of each:—

HELD—that three of the convictions must be quashed.

R. v. RAWSON, [1909] 2 K. B. 748; 101 L. T. 463; *sub nom.* R. v. TRAFFORD-RAWSON, *ETC.*; 78 L. J. K. B. 1156; 73 J. P. 483; *sub nom.* R. v. TRAFFORD-LAWSON AND OTHERS, *JJ.*, 25 T. L. R. 785—Div. Ct.

3. *Offence Alleged against Secretary of a Limited Liability Company—"Cause or Procure"—Cruelty to Animals Act*, 1849 (12 & 13 Vict. c. 92), s. 2.]—The secretary of a limited liability company, who has nothing whatever to do with the state of the company's horses, cannot be convicted of an offence under sect. 2 of the *Cruelty to Animals Act*, 1849, for "causing or procuring" a horse "to be cruelly ill-treated."

HUGHES v. MOONEY, 43 I. L. T. 127—Recorder [of Dublin.

### II. DISEASES OF ANIMALS.

See also III., *infra*.

4. *Carcases Washed Ashore—Disposal under Diseases of Animals Act*, 1894—*Right of the*

*Local Authority to Recover Expenses of Burial against Shipowner—Diseases of Animals Act*, 1894 (57 & 58 Vict. c. 57), s. 46.]—Carcases of mutton, frozen and free from disease when shipped, which are washed ashore out of a stranded vessel, are "carcases" within the meaning of sect. 46 of the *Diseases of Animals Act*, 1894, and where a local authority has incurred expenses in connection with their burial under the direction of a receiver of wreck, with authority from the Board of Trade, the owner of the stranded vessel is liable to repay such expenses to the local authority.

THE SUEVIC, [1908] P. 292; 72 J. P. 407; 77 [L. J. P. 152; 99 L. T. 474; 24 T. L. R. 699; 11 Asp. M. C. 149; 6 L. G. R. 946—Div. Ct.

5. "Suspected of" *Sheep Scab—Suspicion of Persons other than the Owner—Diseases of Animals Act*, 1894 (57 & 58 Vict. c. 57), ss. 22, 52—*Sheep Scab Order*, 1905, s. 1, *sub-s.* 1.]—The *Sheep Scab Order* of the Board of Agriculture and Fisheries, 1905, s. 1, *sub-s.* 1, enacts—"Every person having or having had in his possession or under his charge a sheep affected with, or suspected of, sheep scab," shall give notice of the fact as therein provided.

HELD—that the words "suspected of" do not mean that the party in possession must suspect, nor that it is sufficient if anyone whatsoever suspects to the knowledge of the party in possession; but that they mean that there is a reasonable suspicion known to the party in possession, the reasonableness of the suspicion depending on the facts and circumstances of each case, and particularly on the expert knowledge and experience, or their absence, of a party raising the suspicion, and the comparative knowledge of the party in possession.

MACLEAN v. LAIDLAW, 46 Sc. L. R. 877—Ct. of [Justy.

### III. DOGS.

See also No. 11, *infra*.

6. *Dangerous Dog—Order for Destruction—Removal of Dog out of Jurisdiction—Power of Justices to make Order—Dogs Act*, 1871 (34 & 35 Vict. c. 56), s. 2.]—On March 20th, 1908, the appellant's dog, which had previously bitten several people, bit the respondent's daughter After March 20th, and before the date of an information preferred against the appellant under sect. 2 of the *Dogs Act*, 1871, the appellant sent the dog out of the jurisdiction of the police court, and it continued outside that jurisdiction at the time of the hearing of the information. The justices found that the appellant was the owner of the dog at the time of the offence, and that there had been no *bonâ fide* disposal of it, and they made an order adjudging that the dog should be destroyed.

HELD—that the fact that a dangerous dog has been sent out of the jurisdiction of the particular Court before the information is preferred, or heard, does not prevent the justices making an order, provided there has not been a *bonâ fide* disposal of the dog.

LOCKETT v. WITHEY, 99 L. T. 838; 72 J. P. 492; 25 T. L. R. 16—Div. Ct.

### III. Dogs—Continued.

**7. Dog Licence — Exemption from Duty — Farmer or Shepherd—Number of Dogs—Consent of Justices—Customs and Inland Revenue Act, 1878 (41 Vict. c. 15), s. 22—Dogs Act, 1906 (6 Edw. 7, c. 32), s. 5, sub-s. 1.]—**Sect. 22 of the Customs and Inland Revenue Act, 1878, provides that in the case of dogs kept and used solely for the purpose of tending sheep or cattle on a farm, or in the exercise of the calling or occupation of a shepherd, the owner, whether a farmer or shepherd, may, on signing a declaration in the prescribed form, obtain exemption from duty in respect of the dog or dogs, not exceeding two in number, kept by him solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd.

Sect. 5, sub-sect. 1, of the Dogs Act, 1906, provides that the grant of a certificate of exemption from duty in respect of a dog shall require the previous consent of a petty sessional Court, and that such consent shall not be withheld if the Court is of opinion that the conditions for exemption mentioned in sect. 22 of the Customs and Inland Revenue Act, 1878, apply in the case of the applicant.

**HELD**—that though the justices have a right to inquire whether the applicant for an exemption in respect of two dogs is in fact a farmer, and whether the two dogs were in fact used in tending sheep or cattle, yet, if they are satisfied on these points, they have no right to limit the exemption to one dog instead of two.

**JOHNSON v. WILSON**, [1909] 2 K. B. 497; 78 [L. J. K. B. 912; 101 L. T. 315; 73 J. P. 396; 25 T. L. R. 663—Div. Ct.

**8. Regulation Prescribing Collar—Exemption—Pack of Hounds — Foxhound Puppy being "Walked"—Dogs Order of 1906, art. 1 (1)—Dogs Act, 1906 (6 Edw. 7, c. 32), s. 2 (1) (a).]—**The Dogs Order of 1906 (made by the Board of Agriculture and Fisheries), art. 1 (1), empowers local authorities to make regulations prescribing the wearing by dogs, while in a highway or place of public resort, of a collar with the name and address of the owner, but provides that this regulation shall not apply to any pack of hounds, or any dog while being used for sporting purposes.

**HELD**—that for the purposes of this order a foxhound puppy which belonged to a pack of hounds and was registered as a member of the pack and branded as such, and which was being "walked" for the hunt which owned the pack, came within the expression "pack of hounds," and was therefore exempt from wearing a collar with the name and address of its owner, though not actually being used for sporting purposes.

**BURTON v. ATKINSON**, 72 J. P. 198; 98 L. T. [748; 24 T. L. R. 498; 21 Cox. C. C. 575—Div. Ct.

**9. Regulation Prescribing Control—"Pack of Hounds"—Walking Foxhound Puppy—Order of Local Authority—Diseases of Animals Acts, 1894 to 1903—Dogs Order, 1906.]** By a regulation of a local authority under the Diseases of Animals Acts, 1894 to 1903, and the Dogs Order, 1906, it

was provided that "every dog shall at all times between one hour after sunset and one hour before sunrise be kept by the owner thereof under control by being (i.) confined in a kennel or other enclosure from which it cannot escape, or (ii.) secured to some premises by a collar and chain. Provided that the foregoing regulations shall not apply to any pack of hounds or any dog under the control of the owner or some other person." The appellant walked a foxhound puppy for a certain hunt, the dog having a collar with the name of the hunt inscribed thereon and the initial letter of the hunt and the number of the litter marked on its ear. The dog was found straying in a public highway at 12.45 a.m. without being under the control of the owner or of some other person.

**HELD**—that the proviso to the regulation did not apply to the dog, and that the appellant had committed a breach of the regulation.

**RASDALL v. COLEMAN**, 100 L. T. 934; 73 J. P. [377; 25 T. L. R. 638; 7 L. G. R. 1166—Div. Ct.

**10. "Injury"—Dog Barking at Foals—Causing Foals to Break Away—Contributory Negligence—Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1.]—**The plaintiff was driving home two foals along the public road past defendant's farm when a young dog belonging to the defendant rushed out of the defendant's house and barked at the foals, which broke away from the plaintiff's brother, and were not recovered till the next day. Both foals died from injuries received that night.

**HELD**—that this was not an "injury" within sect. 1 of the Dogs Act, 1906.

**Seem**, the Dogs Act, 1906, does not exclude the defence of contributory negligence.

**CAMPBELL v. WILKINSON**, 43 I. L. T. 237—[Wright, J., Ireland.

### IV. LIABILITY FOR INJURY BY.

*See also* III., *supra*: MASTER AND SERVANT, No. 32

**11. Savage Animal—Wrongful Act of Servant in Charge—Liability of Owner—Scope of Employment.]—**A dog known by the owner to be savage was intrusted to the custody of a servant who incited it to fly at the plaintiff, and it bit her. She brought an action in the county court for damages, but the judge nonsuited her.

**HELD**—that there must be a new trial, as the question whether the servant's wrongful act was done in the course of his employment, or whether it was done for purposes of his own, ought to have been left to the jury.

**HELD ALSO** (Kennedy, L.J., dissenting)—that if a man keeps an animal whose nature is ferocious, or an animal of a class not generally ferocious but which is known to the owner to be dangerous, the owner of that animal is bound to keep it secure at his peril, and is liable for any injury done by it, though the injury is directly brought about through the intervening voluntary act of a third person.

Decision of Div. Ct. ([1908] 2 K. B. 352;

#### IV. Liability for injury by—*Continued.*

77 L. J. K. B. 726; 24 T. L. R. 599; 52 Sol. Jo. 483) affirmed.

BAKER *v.* SNELL, [1908] 2 K. B. 825; 77 [L. J. K. B. 1090; 99 L. T. 753; 24 T. L. R. 811; 52 Sol. Jo. 681; 21 Cox. C. C. 716—C. A.

12. *Sow Straying on Highway—Horse Shying—Negligence—Contributory Negligence—Findings of Jury.*—A sow, the property of the defendant, strayed on to the highway and caused a horse to shy as it was passing the motor car of the plaintiff. In the collision that ensued the plaintiff's car was damaged.

The jury found that the defendant was not negligent in allowing the sow to be on the highway, that the sow caused the horse to shy, and that the probable result of the sow being on the highway was to cause the horse to shy.

The jury could not agree as to whether there was contributory negligence on the part of the driver of the car.

HELD—that on these findings judgment must be entered for the defendant.

Judgment of Bray, J., in *Hadwell v. Righton* ([1907] 2 K. B. 345; 76 L. J. K. B. 891; 71 J. P. 499; 97 L. T. 133; 23 T. L. R. 548; 5 L. G. R. 881), approved.

Decision of Lawrence, J. (72 J. P. 449), reversed.

HIGGINS *v.* SEARLE, 100 L. T. 280; 73 J. P. [185; 25 T. L. R. 301; 7 L. G. R. 640—C. A.

13. *Trespasser in Field Bitten by Savage Horse* *Scienter Found—Field Habitually Used by Public as Short Cut—Action against Owner of Horse—No Duty to Trespasser.*—N., a man who has been bitten by a savage horse, cannot maintain an action against Y., the owner of the horse, who knows that it is savage, if X. when he was bitten was a trespasser in Y.'s field, and this is so, even if the field is habitually and to Y.'s knowledge used by the public as a short cut.

Decision of Div. Ct. ([1909] 2 K. B. 433; 78 L. J. K. B. 874; 101 L. T. 78; 25 T. L. R. 608; 53 Sol. Jo. 544) affirmed, Buckley, L.J., dissenting.

LOWERY *v.* WALKER, [1909] W. N. 249; 26 [T. L. R. 108; 54 Sol. Jo. 99—C. A.

#### V. WILD BIRDS PROTECTION.

14. *Possession of Wild Birds—“Recently Taken”—Primâ facie Evidence—Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 3—Wild Birds Protection Act, 1881 (44 & 45 Vict. c. 51), s. 2.*—The respondent, a dealer in wild birds, was summoned for knowingly and wilfully having in his possession on July 30th. 1907, certain wild birds, namely, seven young larks recently taken. Evidence was given by the appellant, an inspector of the Society for the Prevention of Cruelty to Animals, that he had found on the respondent's premises seven young larks, which he considered were birds of the same year, recently taken, because they were very wild, beating themselves against the bars of their cages, and their feathers were of a light

colour. This evidence was corroborated by another inspector of the society. No evidence was called to show how or when the birds came into the possession of the respondent. The magistrate was of opinion that there was no evidence that the larks were recently taken, and he dismissed the summons without calling on the respondent.

HELD—that there was *primâ facie* evidence that the larks in question had been recently taken, and that the magistrate ought to have considered the case further.

HOLLIS *v.* YOUNG, [1909] 1 K. B. 629; 78 L. J. [K. B. 340; 98 L. T. 751; 72 J. P. 199; 24 T. L. R. 500; 21 Cox. C. C. 582—Div. Ct.

#### ANNUITY.

*See* RENT-CHARGES AND ANNUITIES.

*See also* DEATH DUTIES; INCOME-TAX; REVENUE; SETTLEMENTS; TRUSTS; WILLS.

#### ANTICIPATION, RESTRAINT ON.

*See* HUSBAND AND WIFE; PERPETUITIES; PERSONAL PROPERTY; TRUSTS.

#### APOLOGY.

*See* LIBEL AND SLANDER.

#### APOTHECARIES.

*See* MEDICINE AND PHARMACY.

#### APPEAL.

*See* BANKRUPTCY; COUNTY COURTS; COURTS; CRIMINAL LAW AND PROCEDURE; DEPENDENCIES AND COLONIES; MAGISTRATES; PRACTICE AND PROCEDURE, ETC.

#### APPEALS AS TO LICENSING.

*See* INTOXICATING LIQUORS.

#### APPEALS AS TO RATING.

*See* RATES AND RATING.



**APPOINTMENT, POWERS OF.**

See POWERS.

**APPORTIONMENT.**

See LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL; RENT-CHARGES AND ANNUITIES; SETTLEMENTS; TRUSTS; WILLS.

**APPRAISERS.**

See VALUERS AND APPRAISERS.

**APPRENTICES.**

See INFANTS; MASTER AND SERVANT.

**APPROPRIATION OF PAYMENT.**

See BANKERS AND BANKING; CONTRACT; MONEY AND MONEY-LENDING; MORTGAGE.

**ARBITRATION.**

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**I. ARBITRATORS AND UMPIRES.**

1. *Jurisdiction of Arbitrators—Sale of Goods by Description—Award based on Custom subsequently Found Not to Exist—Custom Inconsistent with Written Contract.*]—By a contract in writing

the appellants sold to the respondents 300 tons of rubber “fair quality Banjermassin Jelutong at £18 15s. per ton c.i.f. Liverpool” . . . and the contract provided: “Any dispute on this contract to be settled by arbitration here in the usual way.” On arrival of the rubber at Liverpool the respondents refused to take delivery on the ground that the goods were not in accordance with the contract. The dispute was referred to arbitrators, who found that the goods were not in accordance with contract, but must be accepted by the buyers at an allowance of 10s. per ton. The award was based upon an alleged custom applicable to contracts for raw material to be shipped to this country, that the buyers should accept the goods with an allowance for inferiority of quality, where that inferiority was, in the opinion of the arbitrators, not excessive or unreasonable. Upon a motion by the respondents to set aside the award, the Court, with counsel’s consent, directed an issue to determine the existence of the alleged custom, and upon the trial of the issue the alleged custom was found not to exist.

HELD—that the arbitrators had no jurisdiction to deal conclusively with the question of the existence of the custom, and that, as the custom had been found not to exist in fact, the award compelling the respondents to accept goods not in accordance with the written contract was bad and must be set aside.

*Hutcheson v. Eaton* (1884) 13 Q. B. D. 861; 51 L. T. 846—C. A.) discussed and followed.

IN RE NORTH WESTERN RUBBER CO. AND [HUTTENBACH & Co., [1908] 2 K. B. 907; 78 L. J. K. B. 51; 99 L. T. 680—C. A.

2. *Arbitrators to be Members of Particular Association—Appointment of Arbitrators not Members of Association—Estoppel—Waiver.*]—Under a contract made between the plaintiffs and the defendant any dispute arising thereunder was to be referred to two arbitrators who were to be members of the London Corn Exchange, the Baltic, or the London Corn Trade Association. A dispute having arisen, each of the parties appointed an arbitrator under the contract and took part in the arbitration. Neither of the arbitrators so appointed was a member of one or other of the associations mentioned, but this was not known to the plaintiffs till after an award had been made.

HELD—that the award was invalid as having been made by persons who were not qualified to be arbitrators under the contract.

*JUNGHEIM, HOPKINS & Co. v. FOUKEL-MANN*, [1909] 2 K. B. 948; 78 L. J. K. B. 1132; 101 L. T. 398; 25 T. L. R. 819; 53 Sol. Jo. 790—Pickford, J.

**II. AWARD.**

[No paragraphs in this vol. of the Digest.]

**III. COSTS.**

3. *Arbitrator’s Charges—Implied Contract by Parties to Submission—Arbitration Act, 1889* (52 & 53 Vict. c. 49), *Sched., Clause (i).*]—Certain disputes between the defendants and another



**III. Costs—Continued.**

company were by agreement referred to arbitration. N. was appointed arbitrator by the defendants and the plaintiff was appointed arbitrator by the other company to the reference. The two arbitrators having failed to agree, the reference devolved upon the umpire, who by his award directed the defendants to pay the plaintiff's charges, but he left the plaintiff to recover those charges from the defendants. The arbitration was subject to the Arbitration Act, 1889.

**HELD**—that the plaintiff, although not appointed as arbitrator by the defendants, could maintain an action against them for his charges, as there was an implied promise by the parties to the submission jointly to pay the arbitrators and umpire for their services.

*Crampton and Holt v. Ridley & Co.* (1887) 20 Q. B. D. 48; 57 L. T. 809; 36 W. R. 554—A. L. Smith, J.) followed.

**BROWN v. LLANDOVERY TERRA COTTA, ETC.,** [Co., LD., 25 T. L. R. 625—Sutton, J.

**IV. SPECIAL CASE.**

[No paragraphs in this vol. of the Digest.]

**V. SUBMISSION TO ARBITRATION.****(a) Effect of.**

**4. Staying Proceedings—Agreement to Refer Dispute to Foreign Court.**—An agreement to refer disputes to a foreign tribunal entitles a defendant to a stay of proceedings in this country, unless the plaintiff makes out a case for an injunction.

**KIRCHNER & Co. v. GRUBAN,** [1909] 1 Ch. [413; 78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151—Eve, J.

**5. "Step in the Proceedings"**—Application to Stay—Arbitration Clause in Agreement—Summons for Directions—Arbitration Act, 1889, s. 4—R. S. C., Ord. 30, rr. 1, 2.]—A party to an action for an account under an agreement containing an arbitration clause, appearing to a summons for directions and undertaking to account, cannot afterwards, even though no order was made on the summons, apply for a stay of proceedings under sect. 4 of the Arbitration Act, 1889.

**OCHS v. OCHS BROTHERS,** [1909] 2 Ch. 121; 78 [L. J. Ch. 555; 100 L. T. 880; 53 Sol. Jo. 542—Warrington, J.

**6. Contract made in Ireland—Printed Form—Construction—Application of English or Irish Act.**—In a policy of insurance in a printed form made in Ireland one of the conditions printed was that in the case of any dispute or difference it should be referred to arbitration, and "all the provisions of the Arbitration Act, 1889, and the Arbitration Act (Scotland), 1894 (where applicable), and such Arbitration Acts as may be in force for the time being, shall apply to any such arbitration":

**HELD**—in the case of an arbitration under the said policy, that the provisions of the Common

Law Procedure (Ireland) Act, 1856, applied and not those of the English Arbitration Act, 1889.

*Quære*, whether in an Irish contract the provisions of an English Act of Parliament can be incorporated by reference.

**LOWDEN v. ACCIDENT INSURANCE CO.,** 43 [I. L. T. 277—Div. Ct., Ireland.

**(b) Pleading as Defence to Action.**

[No paragraphs in this vol. of the Digest.]

**(c) Revocation.**

[No paragraphs in this vol. of the Digest.]

**ARCHITECT.**

*See* BUILDERS, ENGINEERS AND ARCHITECTS; WORK AND LABOUR.

**ARMORIAL BEARINGS.**

*See* WILLS.

**ARMY.**

*See* ROYAL FORCES.

**ARRANGEMENT WITH CREDITORS.**

*See* BANKRUPTCY AND INSOLVENCY.

**ARTICLED CLERK.**

*See* SOLICITOR.

**ARTICLES OF ASSOCIATION.**

*See* COMPANIES.

**ARTICLES OF PARTNERSHIP.**

*See* PARTNERSHIP.

**ARTIZANS' DWELLINGS.**

*See* PUBLIC HEALTH.

**ASSESSMENT.***See* RATES AND RATING.**ASSIGNMENT FOR BENEFIT OF CREDITORS.***See* AGENCY, No. 5 : BANKRUPTCY AND INSOLVENCY.**ASSIGNMENT OF DEBT.***See* CHOSES IN ACTION.**ASSOCIATIONS.***See* BUILDING SOCIETIES ; CLUBS ; COMPANIES ; FRIENDLY SOCIETIES ; INDUSTRIAL SOCIETIES ; TRADE AND TRADE UNIONS.**ASYLUMS.***See* CHARITIES ; LOCAL GOVERNMENT ; LUNATICS ; POOR LAW ; PUBLIC HEALTH.**ATTACHMENT OF DEBT.***See* BANKRUPTCY AND INSOLVENCY ; COUNTY COURTS ; EXECUTION ; PRACTICE AND PROCEDURE.**ATTACHMENT OF PERSON.***See* COMPANIES ; CONTEMPT.**ATTORNEY.***See* SOLICITORS. FOR POWER OF ATTORNEY, *see* AGENCY.**AUCTIONS AND AUCTIONEERS.****I. AUCTIONS.**

[No paragraphs in this vol. of the Digest.]

**II. AUCTIONEERS.***(a)* Liability.

[No paragraphs in this vol. of the Digest.]

*(b)* Generally.

[No paragraphs in this vol. of the Digest.]

*See also* AGENCY : SALE OF GOODS ; TROVER AND CONVERSION.**AUDITORS.***See* COMPANIES.**AUSTRALIA.***See* DEPENDENCIES AND COLONIES.**AVERAGE.***See* SHIPPING AND NAVIGATION.**BAIL.***See* CRIMINAL LAW AND PROCEDURE.**BAILEE, LARCENY BY.***See* CRIMINAL LAW.**BAILIFF.***See* SHERIFFS AND BAILIFFS : COUNTY COURTS ; EXECUTION ; INTERPLEADER.**BAILMENT.**

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*See also* CARRIERS ; CRIMINAL LAW ; INNKEEPERS ; PAWNBROKERS, ETC.**I. HIRE PURCHASE AGREEMENTS.***See also* SALE OF GOODS, No. 1.

1. *Hire of Goods—Hiring Agreement with Option of Purchase—Power of Owner to Retake on Breach of Agreement—Right also to Sue for Arrears of Rent.*—B. let furniture on hire, the hirer paying a lump sum in consideration of an option to purchase at any time during the term of hiring, and also a monthly sum as rent. The hirer could terminate the agreement by a week's notice, and B. could retake the goods if the hirer failed to duly perform the agreement. The rent being in arrear, B. retook possession.

**HELD**—that he could also sue for the arrears of rent.

*Hewison v. Ricketts* ((1894) 63 L. J. Q. B. 711 ; 71 L. T. 191—Div. Ct.) distinguished.

*BROOKS v. BEIRNSTEIN*, [1909] 1 K. B. 98 ; [78 L. J. K. B. 243 ; 99 L. T. 970—Div. Ct.

## II. LIABILITY OF BAILEE.

**2. Railway—Left Luggage Office—Ticket—Reference to Conditions Endorsed on Back of Ticket—Condition of No Liability where Goods over Certain Value unless Declared—Liability where Goods Stolen.**—*L.*, a traveller for L. & Co., deposited with a railway company at their left luggage office at a station three hampers, and received a ticket bearing in legible type a statement that the company only received the articles "upon the conditions expressed upon the back of this ticket." One of these conditions was—"The company will not be responsible for the loss of any parcel, package, or other article when the value . . . exceeds £5 unless at the time of delivery . . . its true value is declared to exceed £5," and a further percentage charge paid in addition to the ordinary charges. *L.* read and understood the statements printed on the face of the ticket, but did not read the conditions printed on the back thereof. He did not declare the value of any of the hampers to exceed £5, and made no additional payment although the value of each was over £5. On presentation of the ticket for delivery, one of the hampers was found to have been stolen. L. & Co. brought an action against the railway company for £84, the value of the hamper.

**HELD**—that L. & Co. were bound by the conduct of *L.* as their agent, and were precluded from denying that the goods in question were deposited with the defenders on the terms contained in the ticket; and that the defenders accepted the goods on deposit on the conditions specified, and were not responsible for any loss or damage suffered by L. & Co. from their loss.

*Harris v. Great Western Ry. Co.* (1876) 1 Q. B. D. 515 followed.

*LYONS & Co. v. CALEDONIAN RY. CO.*, [1909] [S. C. 1185; 46 Sc. L. R. 848—Ct. of Sess.

## III. LIABILITY OF BAILOR.

[No paragraphs in this vol. of the Digest.]

## BAKEHOUSES.

*See* FACTORIES AND WORKSHOPS;  
LANDLORD AND TENANT.

## BAKER.

*See* FOOD AND DRUGS.

## BALLOT.

*See* ELECTIONS.

## BANKERS AND BANKING.

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*See also* BILLS OF EXCHANGE; GUARANTEE, Nos. 1, 2; LUNATICS, No. 3; MISTAKE, No. 3; MONEY AND MONYLENDERS.

### I. APPROPRIATION OF PAYMENTS.

**1. Trust—Knowledge of Bank—Deposit of Securities—Particular Purpose—Lien.**—Bankers have a general lien on the securities of a customer deposited by him with them, otherwise than for a particular purpose, to secure any sum in which the customer may be indebted to the bankers; but the lien is upon the securities of the customer and not upon those of other persons, and it does not attach to securities of the customer known to the bankers to be affected by a trust. Therefore, the owner of securities which her broker, acting under a letter of authority, has deposited with a bank to secure a loan can redeem them from the bank on payment with interest of the sum actually borrowed under the authority.

*Decision of Joyce, J.* ([1909] W. N. 11; 78 L. J. Ch. 113; 100 L. T. 62; 25 T. L. R. 211) affirmed.

*CUTHBERT v. ROBERTS, LUBBOCK & Co.*, [1909] 2 Ch. 226; 78 L. J. Ch. 529; 100 L. T. 796; 25 T. L. R. 583; 53 Sol. Jo. 559—C. A.

**2. Mortgage to Bank to Secure Overdraft—Notice of Subsequent Mortgage—Priority—Further Advances—Tacking.**—The rule in *Clayton's Case* (1 Mer. 572), not being a rule of law, but only a presumption of fact, will not be applied where it is contrary to the intention of the parties. Accordingly it will not be applied for the purpose of putting a mortgagee in a position as regards priority, which was never contemplated or intended by the parties.

*DEELEY v. LLOYD'S BANK, LD.*, 53 Sol. Jo. 399 [—Eve, J.

**3. Army Officer's Pension—Garnishee Order—Receipt for Paymaster-General—Negotiable Instrument—Army Act, 1881 (44 & 45 Vict. c. 58), s. 141.]**—An army officer kept a separate account at his bank for his pension or retired pay. On January 1st, 1909, there was a balance of £6 13s. 8d. in this account, which had previously been received by the officer as pension money. On the same date he sent to his bank a document which on the face of it was a receipt for £17 12s. 6d., paid by the Paymaster-General to the officer on that date. This document, which was signed by the officer, had the following note at the foot of the sheet:—"This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General's office one day for examination." The bank credited the officer with the



**I. Appropriation of Payments—Continued.**

£17 12s. 6d. on January 1st, but only collected this sum from the Paymaster-General on January 7th. On January 1st a garnishee order was served on the bank by a judgment creditor of the officer for a larger sum than £6 13s. 8d.

HELD—that the £6 13s. 8d., having been paid over by the Paymaster-General, had lost its character of pension, and was subject to the garnishee order, notwithstanding sect. 141 of the Army Act, 1881.

HELD ALSO—that the document was not a negotiable instrument, and that the £17 12s. 6d. was not subject to the garnishee order.

JONES & CO. v. COVENTRY, [1909] 2 K. B. [1029; 101 L. T. 281; 25 T. L. R. 736; 53 Sol. Jo. 734—Div. Ct.

**II. CHEQUES.**

4. *Forgery—Cheque Forged by Customer's Servant—Negligence of Customer.*—The secretary of a company forged the signatures of certain of the directors to a number of cheques purporting to be drawn on behalf of the company, and obtained payment thereof from the company's bankers. The company claimed to recover from the bankers the amounts so paid.

HELD—that the fact that the directors had not regularly examined the company's cash-book and pass-book during the period within which the forgeries were committed did not preclude the company from recovering.

HELD FURTHER—that the fact that the pass-book, which contained entries of the forged cheques, had been sent to the bank without objection being taken by the company, who at the time had no knowledge of the forgeries, did not constitute a settled account between the bankers and the company.

As between a bank and its customers, there is no implied agreement by the latter to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants.

KEPITIGALLA RUBBER ESTATES, LD. v. [NATIONAL BANK OF INDIA, LD., [1909] 2 K. B. 1010; 78 L. J. K. B. 964; 100 L. T. 516; 25 T. L. R. 402; 53 Sol. Jo. 377; 14 Com. Cas. 116; 16 Manson, 234—Bray, J.

5. *Pass-book—Customer Acting on Faith of Correctness of Entries—Dishonouring Cheque—Liability of Banker.*—Entries by a banker in his customer's pass-book, although subject to adjustment, are *prima facie* evidence against the banker of the amount standing to the credit of the customer, and the customer, in the absence of negligence or fraud on his part, is entitled to rely upon such entries.

A customer's pass-book showed his balance as £70 17s. 9d., whereas it was actually only £60 5s. 9d., a sum of £10 12s. having been entered twice in the pass-book. The customer, having inspected his pass-book, drew a cheque for £67 11s., which was dishonoured. The customer was not guilty of any fraud or negligence in the matter.

HELD—that although the bank were entitled to have the wrong entry ultimately corrected, the customer was entitled until that correction had been made to act upon the statements in the pass-book; and that, having acted upon those statements and suffered damage thereby, he was entitled to recover against the bank the amount of such damage.

HOLLAND v. MANCHESTER AND LIVERPOOL [DISTRICT BANKING CO., LD., 25 T. L. R. 386; 14 Com. Cas. 241—Lord Alverstone, C. J.

6. *Signature of Directors of a Company—Personal Liability of Directors—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 26, 55.*—A cheque drawn in favour of the plaintiff was stamped near the top with the words "B. Marcus and Co. (Limited)," and was signed by the two defendants as follows:—"B. Marcus, Director. S. H. Davids, Director. —, Secretary," the space for the signature of the secretary being left blank. The name of the company did not appear anywhere except at the top of the cheque.

HELD—that the defendants were personally liable on the cheque.

LANDES v. MARCUS AND DAVIDS, 25 T. L. R. [478—Jelf, J.

7. *Conditional Payment—Interest on Debentures.*—The mere giving of a cheque in respect of interest due on a debenture is not a conditional payment so as to release the security and prevent the debenture-holder claiming, on the non-payment of the cheque, to rank as a secured creditor.

IN RE DEFRIES AND SONS, LD., EICHHOLZ v. [THE COMPANY, [1909] 2 Ch. 423; 78 L. J. Ch. 720; 101 L. T. 486; 25 T. L. R. 752; 53 Sol. Jo. 697—Warrington, J

**III. IN GENERAL.**

See also EVIDENCE, No. 8.

8. *Bankers' Books—Power of Magistrate to Make Order for Inspection—Bankers' Books Evidence Act, 1879 (42 & 43 Vict. c. 11), ss. 7, 10.*—A magistrate has power to make an order for the inspection of a banker's book under sect. 7 of the Bankers' Books Evidence Act, 1879.

R. v. Bradlaugh ((1883) 15 Cox, C. C. 222 n.,—dictum of Coleridge, J.) not followed.

R. v. KINGHORN AND ANOTHER, EX PARTE [DUNNING, [1908] 2 K. B. 949; 78 L. J. K. B. 33; 99 L. T. 794; 72 J. P. 478—Div. Ct.

9. *Debiting Customer's Account without his Authority—Mistake—Liability of Bank.*—One of the essential terms of the contract between a banker and his customer is that the banker will not part with the customer's money without his authority.

In this case the defendant bank was held liable for debiting the plaintiff's account with a



### III. In General—Continued.

payment made under a mistake as to the authority to make it.

BALE v. PARR'S BANK, LD., 25 T. L. R. 549—  
[Lawrence, J.]

### IV. BANK OF ENGLAND.

See STOCK EXCHANGE, No. 1.

## BANKRUPTCY AND INSOLVENCY.

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See also BILLS OF SALE, No. 1; MISTAKE, Nos. 3, 5; MONEY AND MONEY-LENDERS, No. 2; MORTGAGE, No. 9.

### I. MISCELLANEOUS.

[No paragraphs in this vol. of the Digest.]

### II. ACT OF BANKRUPTCY.

[No paragraphs in this vol. of the Digest.]

### III. ADMINISTRATION OF BANKRUPT'S PROPERTY.

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### IV. ANNULMENT OF PROCEEDINGS.

[No paragraphs in this vol. of the Digest.]

### V. BANKRUPTCY NOTICE.

1. *Judgment Debt—Part Payment—Agreement to Pay Balance by Instalments—Default in Payment—Fresh Bankruptcy Notice as to Whole Balance Unpaid—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6.*—A creditor having obtained judgment for £127 9s. 2d., issued a bankruptcy notice thereon, but came to an agreement with the debtor to withdraw the notice upon the debtor giving a cheque for £50 and promising to pay the balance of the judgment debt by quarterly instalments of £8 15s., and to pay three guineas costs. The debtor made default in payment of the costs and of the first two instalments, whereupon the creditor issued a bankruptcy notice and presented a petition in respect of the balance of the judgment debt, amounting to £77 9s. 2d.

HELD—that the agreement entirely extinguished the creditor's rights under the judgment and substituted a new contract, and that as there was only about £20 due under the agreement at the date of the presentation of the petition, there was no sufficient petitioning creditors' debt, and no receiving order could be made.

IN RE A DEBTOR, EX PARTE LONDON AND [COUNTY DISCOUNT CO., 100 L. T. 380; 53 Sol. Jo. 246; 16 Manson, 205—Div. Ct.]

2. *County Court Judgment—Form of Notice—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 105—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g)—Bankruptcy Rules, 1886, r. 136; Appendix, Form 6.*—The petitioning creditor had obtained a judgment against the debtor in a county court for a sum exceeding £20, the judgment ordering the debtor to pay the amount to the registrar of the Court. The debtor did not pay, and the creditor served a bankruptcy notice upon him in the form specified in the Bankruptcy Rules, 1886, Appendix, Form 6, requiring him to pay the amount due on the judgment to the creditor. Upon a petition founded upon non-compliance with the bankruptcy notice:—

HELD—that the notice was bad, as it did not require the creditor to pay the judgment debt in accordance with the terms of the judgment within the meaning of sect. 4, sub-sect. 1 (g), of the Bankruptcy Act, 1883. The proper course is to mould the form of bankruptcy notice to meet the case of a county court judgment. It must also state the creditor's address.

IN RE A DEBTOR EX PARTE THE PETITIONING [CREDITOR, [1908] 2 K. B. 692; 77 L. J. K. B. 998; 99 L. T. 461; 24 T. L. R. 777; 52 Sol. Jo. 641; 15 Manson, 304—C. A.]

3. *Formal Defect or Irregularity—Notice Claiming More than Due—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (g); s. 143.*—A bankruptcy notice required the debtor to pay

**V. Bankruptcy Notice—Continued.**

the creditor a sum of £984 7s. 1d., as being the balance due upon final judgment obtained against the debtor. This sum was £1 5s. 6d. in excess of what was actually due, by reason of the amount of the interest due being overstated.

**HELD**—that the bankruptcy notice was bad, and that the defect was not a formal defect or irregularity within the meaning of sect. 143 of the Bankruptcy Act, 1883, which the Court would amend, and that the notice was bad.

*In re Bates* (1887) 4 Morr. 192 considered.

**IN RE A DEBTOR. EX PARTE THE DEBTOR.**  
[1908] 2 K. B. 684; 77 L. J. K. B. 981; 99 L. T. 458; 24 T. L. R. 778; 52 Sol. Jo. 641; 15 Manson, 295—C. A.

**VI. COUNTY COURTS.**

*See No. 2, supra.*

**VII. DEED OF ARRANGEMENT.**

4. *Liquidation by Arrangement—Liquidation Closed by Statute—Vesting of Property in Official Receiver—Bankruptcy Act, 1869* (32 & 33 Vict. c. 71)—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), s. 160—*Bankruptcy (Discharge and Closure) Act, 1887* (50 & 51 Vict. c. 66), s. 3 (1).]—Sect. 3 (1) of the Bankruptcy (Discharge and Closure) Act, 1887, does not apply to a liquidation by arrangement under the Bankruptcy Act, 1869, so as to close a liquidation resolved on in 1879, and, where the debtor died in 1890, and a sum became payable in 1908 by trustees of a will to the estate of the deceased debtor, a surviving trustee in the liquidation must go on with interpleader proceedings instituted to determine who is entitled to the sum payable under the will.

Decision of Div. Ct. ([1909] W. N. 39) reversed.

**IN RE BARTON, TOMLINS v. LATIMER**, [1909] 2 K. B. 841; 101 L. T. 407—C. A.

5. *Possession by Trustee—Goods Left in Hands of Debtor—Liability of Trustee under Deed to Trustee in Bankruptcy.*]—A trustee under a deed of arrangement took possession of the debtor's stock and sold part of it for £70. Upon hearing that a petition had been presented, the trustee went out of possession, leaving the remainder of the stock in the hands of the debtor, who made away with it before the receiving order was made against him.

**HELD**—that the trustee under the deed must account to the trustee in bankruptcy for the whole of the stock which he had taken possession of and not merely for what he had sold during the time he was in possession.

**IN RE COOK, EX PARTE PARSONS**, 53 Sol. Jo. [359—Div. Ct.]

**VIII. DISCHARGE.**

6. *"Misconduct"—Intermeddling with Estate on Eve of Bankruptcy—Bonâ fide Intention to Benefit Creditors—Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 8.].—A person who intermeddles with his estate when to his knowledge

he is insolvent is not thereby guilty of misconduct if he has acted *bonâ fide* and with the intention of benefiting his creditors.

*In re Skegg* (63 L. T. 90; 7 Morr. 240) distinguished.

**IN RE FREEMAN**, 25 T. L. R. 365—Registrar.

7. *Solicitor Engaging in Hazardous Speculation.*]—*Per Cozens-Hardy, M.R.*: In the case of a solicitor who has engaged in hazardous speculation and incurred large debts with small assets, and who has been made a bankrupt, the Court ought to be slow in granting him a discharge which would remove him from a position in which it may be the duty of the Law Society, in the first instance, or the Master of the Rolls, in the last resort, to say that he ought not to be allowed to practise as a solicitor.

**IN RE DALZELL**, 25 T. L. R. 9; 16 Manson, 203 [—C. A.]

8. *Notice to Creditors of Intended Application for Discharge—Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 28 (5), 127—*Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 8 (6)—*Bankruptcy Rules, 1883*, r. 178—*Bankruptcy Rules*, r. 235—*Form No. 61—Scale of Fees and Percentages, 1900, Table A.*]—Notice of the day appointed for the hearing of a bankrupt's application for discharge must be sent to each creditor who has been returned in the bankrupt's statement of affairs, not merely to such creditors as have proved their debts.

Rule 235 of the Bankruptcy Rules amplifies and is not inconsistent with, sect. 8, sub-sect. 6, of the Bankruptcy Act, 1890.

**IN RE SPATLEY**, [1909] 1 K. B. 559; 78 L. J. K. B. 390; 100 L. T. 378; 25 T. L. R. 261; 53 Sol. Jo. 246; 16 Manson, 91—Bigham, J.

9. *Conditions—Suspension for Time and Until a Specified Dividend has been Paid—Jurisdiction—Bankruptcy Act, 1890* (53 & 54 Vict. c. 71), s. 8, sub-ss. 2, 3.].—There is no jurisdiction to suspend an order of discharge till two conditions have been fulfilled, one of time and one of payment.

**IN RE WALMSLEY, EX PARTE THE BANKRUPT**, [98 L. T. 55; 52 Sol. Jo. 192; 15 Manson, 342—Div. Ct.]

**IX. DIVIDENDS.**

[No paragraphs in this vol. of the Digest.]

**X. FRAUDULENT PREFERENCE.**

[No paragraphs in this vol. of the Digest.]

**XI. INTERIM RECEIVER.**

[No paragraphs in this vol. of the Digest.]

**XII. OFFENCES.**

[No paragraphs in this vol. of the Digest.]

**XIII. PETITION.**

10. *Petition Dismissed—Payment of Costs by Debtor—Jurisdiction—Bankruptcy Act 1883* (46 & 47 Vict. c. 52), s. 105—*Bankruptcy Rules 1886 to 1890*, r. 183 (1).].—A. obtained judgment in an action against B. under Order 14,

### XIII. Petition—Continued.

served him with a bankruptcy notice, and filed a bankruptcy petition against him. B. appealed against the judgment under Order 14, and eventually the Court of Appeal set aside the judgment, and gave him unconditional leave to defend on paying a sum into court, which he did. When the bankruptcy petition came before the registrar, there being then no debt due to the petitioner in consequence of the decision of the Court of Appeal, he dismissed the petition, but ordered B. to pay some of the costs.

HELD—that no receiving order having been made, the case was within r. 183 (1) of the Bankruptcy Rules, 1886 to 1890, and there was no jurisdiction to order B. to pay any costs.

IN RE A DEBTOR, 128 L. T. Jo. 170—C. A.

### XIV. PRACTICE.

11. *Costs—Taxation—Small Bankruptcies—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 121—Bankruptcy Rules, r. 112, sub-ss. 1, 2.*—During the course of a small bankruptcy the Official Receiver, as trustee, employed solicitors to obtain probate of the will of the bankrupt's wife. The Registrar of the county court taxed off two-fifths of the profit costs of the solicitors, holding that the steps taken to obtain probate were proceedings under the Bankruptcy Act within the terms of r. 112 of the Bankruptcy Rules.

HELD—that the words "proceedings under the Act" must be strictly construed, and did not apply to proceedings taken outside the Bankruptcy Court.

Decision of Div. Ct. (52 Sol. Jo. 728) affirmed.

In re Parfitt ((1889), 23 Q. B. D. 40; 58 L. J. Q. B. 428; 61 L. T. 88) approved.

IN RE WEIGHILL, [1909] 1 K. B. 92; 78 L. J. [K. B. 86; 100 L. T. 58; 25 T. L. R. 62; 53 Sol. Jo. 63; 15 Manson, 335—C. A.

12. *Notice to Creditors of Intended Application for Discharge—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 28 (5), 127—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 8 (6)—Bankruptcy Rules, 1883, r. 178—Bankruptcy Rules, r. 235—Form No. 61—Scale of Fees and Percentages, 1900, Table A.*—Notice of the day appointed for the hearing of a bankrupt's application for discharge must be sent to each creditor who has been returned in the bankrupt's statement of affairs, not merely to such creditors as have proved their debts.

Rule 235 of the Bankruptcy Rules amplifies, and is not inconsistent with, sect. 8, sub-sect. 6, of the Bankruptcy Act, 1890.

IN RE SPRATLEY, [1909] 1 K. B. 559; 78 L. J. [K. B. 390; 100 L. T. 378; 25 T. L. R. 261; 53 Sol. Jo. 246—Bigham, J.

13. *Private Examination—Right of Counsel for Witness to take Notes—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 27.*—During the examination of a witness under sect. 27 of the

Bankruptcy Act, 1883, counsel for the trustee objected to counsel for the witness taking notes, and his objection was upheld by the registrar, who said he felt bound by authority.

HELD—that the registrar was wrong, and that if he allowed counsel to appear for the witness at all, he must allow him to re-examine the witness, and must, therefore, allow him to take notes.

IN RE WALKER, EX PARTE CHILDE, [1909] [W. N. 104; 100 L. T. 860; 25 T. L. R. 528; 53 Sol. Jo. 486; 16 Manson, 207—Div. Ct.

### XV. PRIORITIES.

See also PARTNERSHIP, No. 1.

14. *Preferential Payment—Friendly Society—Bankruptcy of Ex-Treasurer—Debt due to Society—Right of Society to Preferential Payment—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 2 (1)—Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35.*—Sect. 35 of the Friendly Societies Act, 1896, provides that "upon the death or bankruptcy of any officer of a registered society having in his possession by virtue of his office any money or property belonging to the society," the trustees of the society are entitled to be paid such money in preference to any other debt or claim against such officer's estate.

HELD—that the above section applied in a case where the bankrupt had ceased to be an officer of the society some time before he became bankrupt, but had not handed over the money in his possession as such officer to the trustees of the society.

IN RE EILBECK, EX PARTE TRUSTEES OF THE [GOOD INTENT LODGE, No. 978, OF THE GRAND UNITED ORDER OF ODDELOWES, [1909] W. N. 246; 101 L. T. 688; 26 T. L. R. 111; 54 Sol. Jo. 118—Phillimore, J.

### XVI. PROOF OF DEBTS.

15. *Joint and Separate Proof—Breach of Trust by One Partner—Express Trustee—Director of Company and Member of Partnership—Misappropriation of Company's Assets—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II, r. 18.*—Where one member of a firm, being an express trustee, wrongfully concurs in a misappropriation by the firm of the trust fund, proof may be allowed against both the joint estate of the firm and the separate estate of the defaulting trustee.

The fact that the trust fund properly came into the hands of the firm for a specific purpose makes no difference; neither does it make any difference that the trust was not express and that the partners had not originally possession of the trust fund.

The same principle applies wherever there is a fiduciary relationship resting upon contract, such as that of a promoter, agent, or director of a company.

In re Parkers ((1887), 19 Q. B. D. 84; 56 L. J. Q. B. 338; 57 L. T. 198; 35 W. R. 566; 4 Manson, 35—Cave, J.) followed.



## XVI. Proof of Debts—Continued.

Decision of Bigham, J. (99 L. T. 306; 52 Sol. Jo. 623) reversed.

IN RE P. MACFADYEN, EX PARTE VIZIANA-  
[GARAM MINING CO., LD., [1908] 2 K. B.  
817; 77 L. J. K. B. 1027; 99 L. T. 759; 52  
Sol. Jo. 727; 15 Manson, 313—C. A.

16. *Secured Creditor — Mortgage — Vendor's Lien—Assessment of Securities as a Whole—Consolidation—Life Policies—Premiums Paid by Mortgagee.*—Where a creditor of a bankrupt is entitled to a small debt charged upon a property of large value and to a large debt charged upon a property of small value, and has no right to consolidate, the trustee in bankruptcy cannot allow him to prove for one aggregate amount stating that he holds one aggregate security, and thus give him the benefit of consolidation, so as to take the unsecured balance of the large debt out of the surplus value of security in the case of the security for the small debt.

In P.'s bankruptcy B. K. & Co. were creditors for £6,497. They held a mortgage executed by P. in their favour of two life policies, of a debt due to P. and of certain freehold property. They also claimed a vendor's lien on certain steamship shares. They lumped together the latter and the mortgage and assessed their total security at £3,806. P.'s trustee admitted their proof for the balance of £2,691, and for this they subsequently received a composition of 12s. in the pound. The debt due to P. realised more than anticipated, and out of the proceeds of it the trustee paid to B. K. & Co. £2,276, being the value which they had put on this debt and the freehold property. The life policies, valued at £205, realised less than that sum. The bankruptcy having been annulled, P. executed further mortgages on the freehold property and again became bankrupt. The property was sold by a first mortgagee, who paid the balance of the proceeds into Court. Out of this sum B. K. & Co. now claimed to be repaid the unpaid balance of the £3,806.

HELD—that B. K. & Co. were not entitled to have their claim in respect of the steamship shares satisfied out of the sum in Court, but that as the trustee could not compel a creditor to value separate properties comprised in one mortgage they were entitled to have made good the loss on the life policies.

*Pearce v. Bullard, King & Co.* ([1908] 1 Ch. 780; 77 L. J. Ch. 340; 98 L. T. 527; 24 T. L. R. 353; 52 Sol. Jo. 301; 15 Manson, 88—Joyce, J.) overruled.

Decision of Warrington, J., reversed.

HELD FURTHER—that B. K. & Co. were entitled to be repaid with interest the premium paid by them to keep alive the policies from the date of the receiving order and not merely from the date on which they were admitted to prove for the balance due to them as unsecured creditors.

IN RE PEARCE'S TRUSTS, [1909] 2 Ch. 492; 78 [L. J. Ch. 628, 784; 100 L. T. 792; 101 L. T. 300; 16 Manson, 191—C. A.]

17. *Application to Expunge Proof — Locus standi of Debtor—Scheme of Arrangement—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), Sched. II., r. 25.*—A debtor has no *locus standi* to apply to expunge a proof unless there is a proposal for a composition or scheme of arrangement actually lodged with the Official Receiver at the time when the debtor's application comes on for bearing.

IN RE BENOIST, [1909] 2 K. B. 784; 78 L. J. [K. B. 1105; 101 L. T. 432; 53 Sol. Jo. 700—Phillimore, J.]

18. *Unsuccessful Application by Debtor to Expunge Proofs—Scheme Pending Subsequent Adjudication—Costs of Creditors in Resisting Debtor's Application.*—A receiving order having been made against the debtor, he submitted a scheme of arrangement, and while the scheme was pending he moved to expunge the proofs lodged by two of his creditors. The application was dismissed with costs. The scheme was not sanctioned by the Court, the debtor was adjudicated a bankrupt, and a dividend of 5s. in the pound had been paid to all the creditors by the trustee in the bankruptcy. The Court refused to sanction payment by the trustee of the costs incurred by the two creditors in the application by the bankrupt to expunge their proofs.

IN RE PILLING, [1909] 2 K. B. 788; 78 L. J. [K. B. 1107; 101 L. T. 433; 25 T. L. R. 809—Phillimore, J.]

19. *Withdrawal — Composition — Creditor Agreeing to Accept Something other than Composition.*—Where a creditor having proved for certain debts subsequently agreed to withdraw his proofs, receiving in exchange the bankrupt's interests in certain businesses, and it was proved that the value of these interests was smaller than the amount of the composition, accepted by the other creditors, on the debts withdrawn would have been, it was held that it would be carrying the doctrine of the policy of the bankruptcy law too far if an agreement were to be upset, which was not preferential, but which put the creditor in a worse position for the benefit of the bankrupt or of the person providing the money for the composition.

BEALE v. BEALE, 126 L. T. Jo. 328—Parker, J.

## XVII. PROPERTY OF BANKRUPT.

## (a) Generally.

20. *Trust Property—Will—Gift to Executor and Trustee Absolutely—Unexpressed Trust—Letter to be Opened after Death—Bankruptcy of Legatee—Title of Trustee in Bankruptcy.*—A testatrix appointed B., her husband, executor and trustee of her will, which B. duly proved. The will gave B. certain property absolutely. About the time when the will was made B. promised the testatrix that if the property was left to him he would carry out certain wishes of the testatrix which she informed him were contained in a letter to be opened after her death. The letter directed certain specific gifts and that the rest, "after you have taken what you want," should be kept for the daughter-in-law of the



### XVII. Property of Bankrupt—Continued.

testatrix. B., a bankrupt, now claimed to be entitled as trustee of the will to this property as against his trustee in bankruptcy.

**HELD**—without deciding that a valid trust was created, that the trustee in bankruptcy could not be allowed to take what the bankrupt honestly considered he held as trustee, but that as B. was entitled to keep what he wanted of the residue his trustee in bankruptcy could take what B. ought to want to satisfy his creditors.

IN RE BELL, EX PARTE THE DEBTOR, 99 L. T. [939—Bigham, J.

**21. Life Assurance Policy—Discharge of Bankrupt—Subsequent Payment of Premiums—Death of Assured—Claim to Policy Moneys.**—A man, having effected a policy upon his own life, and having paid the first premium, became bankrupt but shortly afterwards received his discharge. He did not disclose the policy, believing it to be of no value. Afterwards he continued to pay the premiums on the policy up to the time of his death, when his legal personal representatives claimed the policy moneys as against the trustee in bankruptcy.

**HELD**—that the debtor's representatives were not entitled to any part of the policy moneys.

Decision of Eve, J. (101 L. T. 25; 53 Sol. Jo. 503), affirmed.

TAPSTER v. WARD, 101 L. T. 503—C. A.

**22. Disclaimer of Lease of Plot of Land—Bankrupt having Mortgaged by Demise Portions of Plot—Order Vesting in Mortgagees whole Plot Including Portion not Mortgaged—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, sub-s. 6.**—The lessee of a plot of land mortgaged by sub-demise four portions of the plot to four different mortgagees, retaining the remainder of it. He subsequently became bankrupt, and his trustee in bankruptcy disclaimed the lease. A trustee for the four mortgagees (himself a solvent person) applied to a county court judge for an order vesting in him as such trustee all the rights, interest, and title of the bankrupt under the lease, including the portion of the plot not mortgaged, subject to the rent, covenants, and conditions contained in the lease. The county court judge made the order.

**HELD**—that the order was properly made.

IN RE HOLMES, EX PARTE ASHWORTH, [1908]  
[2 K. B. 812; 77 L. J. K. B. 1129; 52 Sol. Jo. 728; 5 Manson, 331—Div. Ct.]

#### (b) Order and Disposition.

[No paragraphs in this vol. of the Digest.

#### (c) Undischarged Bankrupt—After-acquired Property.

**23. Purchase of Freehold by Undischarged Bankrupt Trading as Partners—Sale to Company—Re-sale by Liquidator—Title of Trustees in Bankruptcy—Realty or Personalty.**—D. and G., two undischarged bankrupts, having entered into partnership, had conveyed to them some freehold land with buildings suitable for a gas-

works business. In the conveyance the two partners, afterwards referred to as the purchasers, were described as "trading as D. & Co." They afterwards sold the property for a sum in cash to a trustee for a company about to be formed. The company when formed soon went into liquidation, and the property was sold by the liquidator for £1,250. The respective trustees in bankruptcy of D. and G. having then for the first time become aware of their dealings with the property, claimed the £1,250 on the ground that the freehold land conveyed to D. and G. vested in their trustees immediately on the execution of the conveyance, and still vested in them.

**HELD**—that the deed of March 13th clearly conveyed the freehold property to the partners as partnership property, and that therefore the interest in each portion of this freehold property was personalty; that therefore the doctrine of *Cohen v. Mitchell* ((1890), 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 54 J. P. 804; 7 Morr. 207) applied; and that as this personalty had been acquired by the partners after the commencement of their respective bankruptcies, and that as neither of their trustees had intervened, the freehold property duly passed to the company.

IN RE KENT COUNTY GAS LIGHT AND COKE [Co., LD., [1909] 2 Ch. 195; 78 L. J. Ch. 625; 100 L. T. 983; 16 Manson, 185—Neville, J.]

### XVIII. RECEIVING ORDER.

**24. Married Woman—Separate Trading—Separate Property—Jurisdiction—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 5—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 152.**—In order to bring a married woman within the jurisdiction of the Bankruptcy Court, the only condition precedent required is proof that she is trading separately from her husband; it is not necessary to prove that she is possessed of separate property.

*In re Helsby, Ex parte Helsby* ((1893), 1 Manson, 12) overruled on the point.

A business may be carried on by a wife separately from her husband, although it is carried on under his management.

IN RE SIMON, [1909] 1 K. B. 201; 78 L. J. [K. B. 392; 100 L. T. 133; 25 T. L. R. 140; 53 Sol. Jo. 117; 16 Manson, 96—C. A.]

**25. Appeal—Practice—Time for Entering Appeal—R. S. C., Ord. 58, r. 1—Bankruptcy Rules, 1886, rr. 130-2.**—An appeal against a receiving order ought to be not merely served, but actually set down for hearing within the twenty-one days limited by r. 130.

In the particular case the time was extended upon terms, the appellant having misunderstood the effect of the rule.

IN RE TAYLOR, EX PARTE BOLTON, [1909]  
[1 K. B. 103; 78 L. J. K. B. 102; 99 L. T. 939; 25 T. L. R. 77; 16 Manson, 19—Bigham, J.]

**26. Decree for Dissolution of Marriage—Order for Payment of Costs by Co-respondent—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103,**

## XVIII. Receiving Order.—Continued.

*sub-s. 5—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.*—Although a decree *nisi* for dissolution of marriage containing an order for the payment of the petitioner's costs by the co-respondent is not a final judgment upon which a bankruptcy notice can be founded, a receiving order may, nevertheless, be made against the co-respondent upon a judgment summons in lieu of committing him to prison for default in payment of the money due under the order.

IN RE HALLMAN, EX PARTE ELLIS AND [COLLIER, [1909] 2 K. B. 430; 78 L. J. K. B. 1009; 100 L. T. 861; 25 T. L. 607; 53 Sol. Jo. 544—Phillimore, J.

## XIX. SCHEME OF ARRANGEMENT.

27. *Trust Funds Employed and Lost in Trustees' Private Business—Receiving Order—Acceptance by New Trustees of Composition in Full Discharge—Division of Estate—Former Trustee Entitled to Share—Liability to Account—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 18, 19, 30.*—J. S. and C. J. S., trustees under the will of J. S. (the father), employed certain of the trust funds in their private business. In 1885 a receiving order was made against them, and a composition or scheme of arrangement under the Bankruptcy Act, 1883, was duly confirmed by their creditors and approved by the Court. By an order of Court made on December 19th, 1885, the Court appointed J. W. and H. W. new trustees of the will in substitution for J. S. and C. J. S. Under the composition or scheme of arrangement the new trustees received 6s. in the pound by way of dividend in full discharge of their debts. Afterwards the testator's estate became divisible, C. J. S. being then beneficially entitled to a share. This was a summons taken out by the surviving trustee to determine (*inter alia*) whether C. J. S. could receive his share without making good what the estate had lost through his improper dealing with it.

HELD—that the acceptance by the new trustees of the composition under the Bankruptcy Act relieved the old trustees from any liability to the trust, and that the equity which was asserted did not arise.

IN RE SEWELL, WHITE v. SEWELL, [1909] 1 Ch. [806; 78 L. J. Ch. 432; 100 L. T. 883; 16 Manson, 113—Parker, J.

## XX. SET-OFF.

28. *Mutual Dealings—Company Petitioning Creditor—Claim to Set-off Debenture Stock in Company—Previous Appointment of Receiver of Debtor's Interest—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 7 (3), 38.*—A debtor held debenture stock in the petitioning creditor company which he claimed to set-off against the debt due to the company. After the presentation of the bankruptcy petition, but before it was finally heard, a receiver was appointed on behalf of another creditor of the debtor's interest in this debenture stock.

HELD—that after the appointment of the receiver there was no answer to the petitioning creditor company's debt either by way of set-off or of mutual credits.

*Per Fletcher Moulton, L.J.:* Moneys which under a bankruptcy became payable to the trustee by the petitioning creditor because they were payable to the debtor come *prima facie* within the mutual credits clause, but not if they are moneys which, upon bankruptcy, become payable to the trustee in his right as trustee and not by virtue of their being payable to the debtor.

*Per Farwell, L.J.:* A claim by way of set-off, mutual dealings, or the like, is nothing but a plea in the nature of a cross-action, set up in answer to the petitioner in bankruptcy, and must be proved like any other plea at the hearing. If it then appears that the amount claimed has been alienated or charged either voluntarily or *in invitum* to such an extent as to render it inadequate, the plea fails for want of proof.

IN RE A DEBTOR, EX PARTE PEAK HILL [GOLDFIELD, LD., [1909] 1 K. B. 430; 78 L. J. K. B. 354; 100 L. T. 213; 16 Manson, 11—C. A.

29. *Dismissal of Petition with Costs—Non-compliance with Order Directing Payment of Costs—Judgment Summons—Right of Petitioning Creditor to set off Debt against Costs—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.*—D. obtained judgment against A., a married woman, who had been carrying on a boarding house, and the judgment remaining unsatisfied he presented a bankruptcy petition against her, the act of bankruptcy alleged being that A., with intent to delay and defeat her creditors, had absented herself from her place of business. On the hearing of the petition the Court held that the alleged act of bankruptcy had not been proved, and dismissed the petition with costs. These costs having been taxed, A. obtained an order of the Court of Bankruptcy that D. should pay them, but he did not comply with that order. Thereupon A. took out a judgment summons under the Debtors Act, 1869, requiring D. to show cause why he should not be committed to prison for his default. It was admitted that D. had the means to pay, but he claimed that he was entitled to set off his debt against the costs payable to A.

HELD—that the debt could not be set off against the costs, and that an order should be made that D. pay the costs in two equal instalments.

IN RE DRUMMOND, EX PARTE ASHMORE, [1909] 2 K. B. 622; 78 L. J. K. B. 935; 25 T. L. R. 706; 53 Sol. Jo. 651; 16 Manson, 200—Phillimore, J.

30. *Mutual Dealings—Contract to Purchase Real Estate—Purchase Money—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 38.*—A person who has a contract to purchase real estate from the bankrupt entered into prior to the receiving order can set off a debt due to him from the bankrupt at the date of the receiving order against the purchase money due under the contract.

IN RE TAYLOR, EX PARTE NORVELL, 101 L. T. [687; 26 T. L. R. 100; 54 Sol. Jo. 102—Div. Ct.



## XXI. TRUSTEE.

**31. Necessary or Desirable Party—Trustee in Bankruptcy of Defendant in Chancery Action—Option of Benefit to the Bankrupt under Order of Court before Bankruptcy—Beneficial Interest of Bankrupt in Funds in Court—Jurisdiction of Bankruptcy Court to Re-open Accounts Ordered under Decree of the Chancery Division—R. S. C., Ord. 17, r. 4.]**—An order was made in an action wherein Mrs. J. was the plaintiff and W. H. H. one of the defendants, that at the request of the defendant W. H. H., and at his risk as to costs, an inquiry should be made as to whether any and what allowance should be made to him for the maintenance of certain beneficiaries' out of certain sums found due from him under accounts ordered to be taken in the action; that certain shares (in which W. H. H. was interested as a beneficiary) should be sold by the trustees, and the proceeds paid into Court, and that any of the parties might be at liberty to apply as to payment of the above-mentioned sums. W. H. H. became bankrupt; the plaintiff obtained an order to carry on the proceedings against his trustee in bankruptcy. The latter applied by summons to discharge the order.

**HELD**—that it was desirable that the trustee in bankruptcy should be made a party in order to enable the action to proceed in respect of the sums as to which W. H. H. had an election for an inquiry and to bind his estate by the order relating to the shares.

The Bankruptcy Court has no jurisdiction to conduct an inquiry as to maintenance, ordered upon terms by the Chancery Courts, and the Bankruptcy Court cannot go behind an order properly made by the Chancery Division, except for inadequacy of consideration, fraud, or collusion.

**IN RE SYKES, JARAM v. HOLMES**, 100 L. T. 265; [53 Sol. Jo. 267—Joyce, J.]

**32. Default of Trustee — Fidelity Bond — Liability of Assurance Company under Bond to Board of Trade — Penal Interest Payable by Trustee—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) s. 74 (6).]**—When an assurance company gives a bond to the Board of Trade to make good any loss or damage occasioned to the bankrupt's estate by any default of the trustee it is liable to make good the trustee's default in payment of the penal interest exacted from him, under sect. 74, sub-sect. 6, of the Bankruptcy Act, 1883, for improper retention of the moneys of the estate; and it cannot set off the amount that the estate has benefited by the forfeiture of the trustee's remuneration.

**BOARD OF TRADE v. EMPLOYERS' LIABILITY [ASSURANCE CORPORATION, LD., [1909]**  
W. N. 263; 26 T. L. R. 167; 54 Sol. Jo. 136—Phillimore, J.]

## XXII. VOLUNTARY ASSIGNMENT.

**33. Settlement — Post-Nuptial Settlement — Husband Declaring Himself Trustee for Wife and Children — No Actual Transfer — Interest of Settlor Passing—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47, sub-s. 1.]**—A married man by a deed executed more than two and

within ten years before his bankruptcy declared that he or other the trustee of the deed would stand seised of certain of his real property upon trust for sale, and to hold the proceeds when invested upon trust for his wife and children, and until sale the rents and profits of the property were to be applied upon the same trusts. At the date of the deed the husband was able to pay all his debts without the aid of the property in question.

**HELD**—that, though there was no actual transfer of the legal estate, the declaration of trust was sufficient to pass the interest of the settlor within the meaning of sect. 47, sub-sect. 1, of the Bankruptcy Act, 1883, and that therefore the settlement was valid as against the trustee in bankruptcy of the settlor.

**SHRAGER AND ANOTHER v. MARCH**, [1908]  
[A. C. 402; 77 L. J. P. C. 105; 99 L. T. 33;  
24 T. L. R. 641; 52 Sol. Jo. 580; 15 Manson,  
310—P. C.]

## BARRATRY.

See CRIMINAL LAW: SHIPPING AND NAVIGATION.

## BARRISTERS.

See also PRACTICE, No. 15; SOLICITORS, No. 14.

**1. Defending Prisoner at Judge's Request—No Obligation to take Further Steps after Trial.]**—The fact that a judge has asked counsel to defend a prisoner at assizes does not impose an obligation on counsel to take further steps in the interests of the prisoner after the trial.

**R. v. THE GOVERNOR OF H.M. PRISON AT [STAFFORD, EX PARTE EMERY**, 73 J. P. 284;  
25 T. L. R. 440—Div. Ct.]

**2. Counsel's Fees—Recovery from Solicitor—Resort to Disciplinary Machinery of the Court Not Encouraged.]**—The idea that counsel should resort to the disciplinary machinery of the Court in order to get their fees from solicitors is not to be encouraged. Counsel have other remedies, such as refusing to do further work until paid fees previously due or insisting on payment of fees in advance.

**IN RE A SOLICITOR, EX PARTE THE LAW [SOCIETY, Times, January 27th and 28th,**  
1909—Div. Ct.]

## BASTARDY.

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I. AFFILIATION PROCEEDINGS . . .	42
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See also PRACTICE, No. 12; SETTLEMENTS, No. 1.

## I. AFFILIATION PROCEEDINGS.

**1. Affiliation Order — Death of Putative Father — Arrears of Maintenance — Claim**

**I. Affiliation Proceedings—Continued.**

*against Putative Father's Estate—Bastardy Laws Amendment Act, 1872 (35 & 36 Viet. c. 65), s. 4.*—Where an affiliation order has been made for the payment of a weekly sum by the putative father to the mother of an illegitimate child and the father dies leaving arrears of the sum unpaid, such arrears or any payment accruing due cannot be recovered from the father's estate.

IN RE HARRINGTON, WILDER v. TURNER, [1908] 2 Ch. 687; 78 L. J. Ch. 27; 99 L. T. 723; 72 J. P. 501; 25 T. L. R. 3; 52 Sol. Jo. 855; 21 Cox, C. C. 709—Warrington, J.

2. *Agreement to Avoid Proceedings—Payment of Weekly Sums by Putative Father—Mother to Maintain the Child—Agreement Terminated by Death of Mother.*—A contract made between the putative father and the mother of a bastard child, the father undertaking to pay a weekly sum for the maintenance of the child up to the age of fourteen years, and the mother undertaking to maintain the child and not to take affiliation proceedings, is terminated on the death of the mother, although the child is less than fourteen years of age, and neither the benefit nor the burden of the contract passes to the personal representatives of the mother.

JAMES v. MORGAN, [1909] 1 K. B. 564; 78 L. J. [K. B. 471; 100 L. T. 238; 73 J. P. 149; 25 T. L. R. 267; 53 Sol. Jo. 245—Div. Ct.

3. *Corroboration—Scottish Law—Evidence of Defender Contradicted.*—In an action of filiation, in which the alleged intercourse was said to have been in a hay-shed and opportunity was proved, the defender denied ever having been in a certain byre alone with the pursuer without his brother-in-law also being present. It was proved that on some occasions a farmer and not the brother-in-law had been the third party.

HELD—that as the contradiction of the defender was not regarding a circumstance throwing suspicion on him, it did not amount to corroboration of the pursuer's evidence.

Dawson v. M'Kenzie ([1908] S. C. 648; 45 S. L. R. 473) approved.

McWHIRTER v. LYNCH, 46 Sc. L. R. 83—[Ct. of Sess.]

**II. CUSTODY OF BASTARDS.**

[No paragraphs in this vol. of the Digest.]

**III. LEGITIMACY.**

[No paragraphs in this vol. of the Digest.]

**BATHS AND WASH-  
HOUSES.**

See LOCAL GOVERNMENT.

**BATTERY.**

See CRIMINAL LAW; TRESPASS.

**BECHUANALAND.**

See DEPENDENCIES AND COLONIES.

**BEER.**

See FOOD AND DRUGS.

**BEEES.**

See ANIMALS.

**BENCH WARRANTS.**

See CRIMINAL LAW AND PROCEDURE.

**BENEFICE.**

See ECCLESIASTICAL LAW.

**BENEFIT BUILDING  
SOCIETIES.**

See BUILDING SOCIETIES.

**BETTERMENT.**

See METROPOLIS.

**BETTING.**

See CRIMINAL LAW; GAMING AND  
WAGERING; INTOXICATING LIQUORS.

**BICYCLES.**

See CARRIERS; HIGHWAYS; STREET  
TRAFFIC.

**BILLS OF EXCHANGE,  
PROMISSORY NOTES,  
AND NEGOTIABLE  
INSTRUMENTS.**

For CHEQUES see under BANKERS AND  
BANKING. COL.

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See also BANKERS.

**I. BILLS OF EXCHANGE.**

1. *Bills of Limited Company—Unauthorised  
Acceptance of Bills by Director in Name of*



## I. Bills of Exchange—Continued.

*Company*—“*Acting under the Authority of the Company*”—*Companies Act, 1862* (25 & 26 Vict. c. 89), s. 47.]—Certain bills drawn on a limited company were accepted by T., one of its directors, without the knowledge or sanction of his co-directors. There was no consideration to the company for, and they received no part of the proceeds of, the bills. Among the objects of the company as defined by its memorandum were the drawing, making, accepting, indorsing, and discounting of bills and promissory notes, and by its articles of association the directors were authorised to delegate any of their powers to committees consisting of such member or members of their body as they thought fit. In an action on the bills by *bona fide* holders for value:

**Held**—that as T. had no authority in fact to accept the bills, he was not in accepting them “acting under the authority of the company” within the meaning of sect. 47 of the *Companies Act, 1862*, and, therefore, the company was not bound by his acceptances.

*PREMIER INDUSTRIAL BANK, L.D. v. J. AND W. CRABTREE, L.D.*, [1909] 1 K. B. 106; 78 L. J. K. B. 103; 99 L. T. 810; 25 T. L. R. 17; 16 *Manson*, 22 *Pickford*, J.

## II. PROMISSORY NOTES.

See also *GIFTS*, No. 2; *PLEADING*, No. 1.

2. *Signatures as Agent—Director of Company—Authority—Liability.*—The defendant, the managing director of a company with authority to make promissory notes on behalf of the company, signed a promissory note as follows:—“J. H. Smethurst’s Laundry and Dye Works, Limited. J. H. Smethurst, Managing Director.” The actual signature “J. H. Smethurst” was written, the other words being impressed by a rubber stamp.

**Held**—that the company alone, and not the defendant personally, were liable on the note.

*Decision of Channell, J.* ([1909] 1 K. B. 73; 78 L. J. K. B. 84; 99 L. T. 853; 14 *Com. Cas.* 21) reversed.

*CHAPMAN v. SMETHURST*, [1909] 1 K. B. 927; [78 L. J. K. B. 654; 100 L. T. 465; 25 T. L. R. 383; 53 *Sol. Jo.* 340; 14 *Com. Cas.* 94; 16 *Manson*, 171—C. A.

3. *Stamp—Agreement—Guarantee—Promissory Note—Stamp Act, 1891* (54 & 55 Vict. c. 39), s. 33.]—A document was signed in the following form:—“I, G. H. B. R., owe you, Mrs. E. B., the sum of £100 in consideration of money lent, and will pay the same (*plus* interest at the rate of 10 per cent. per annum) on or before October 7th, 1907. Interest to be paid half-yearly on April 7th and October 7th. (Signed), G. H. B. R. In the event of G. H. B. R. failing to pay the above through any cause whatsoever we hereby make ourselves responsible for such amount due. (Signed) J. P.; B. R.” “I, B. R., agree to Mrs. E. B. holding the policy on the life of my husband, G. H. B. R., until the above sum is paid in full. (Signed) B. R.” The document was stamped with a 6d. stamp for

the guarantee and a 1s. stamp for the equitable assignment of the policy.

**Held**—that the document was not a promissory note, and therefore did not require to be stamped as such.

*BALCK v. FLETCHER AND ANOTHER*, 25 T. L. R. [497—Div. Ct.]

## III. INSTRUMENTS NEGOTIABLE BY MERCANTILE USAGE.

4. *Receipt for Army Pension—Paymaster-General’s Pay Warrant.*—A form of receipt, signed by a retired army officer for the amount of his pension due and having the following note at the foot:—“This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General’s office one day for examination,” is not a negotiable instrument.

*JONES & CO. v. COVENTRY*, [1909] 2 K. B. 1029; [101 L. T. 281; 25 T. L. R. 736; 53 *Sol. Jo.* 734—Div. Ct.]

See *S. C.* under *BANKERS AND BANKING*, No. 3.

## BILLS OF LADING.

See *SHIPPING AND NAVIGATION*.

## BILLS OF SALE.

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### I. GENERALLY.

1. *Licence to take Possession—Goods on Premises of Railway Company—Tenancy—Lien of Company for Sums Due—Bankruptcy—Damages for Trespass and Causing Bankruptcy—Cause of Action not passing to Trustee—Mutual Dealings—Bills of Sale Act, 1878* (41 & 42 Vict. c. 31), s. 4—*Bankruptcy Act, 1883* (46 & 47 Vict. c. 52), ss. 38, 44.]—A railway company let to a coal merchant a certain piece of land at a rental for the purpose of stacking coal unloaded from trucks on the company’s sidings. The land adjoined the railway sidings, and was within the company’s yard, the gates of which were closed during certain hours of the night. By certain agreements the company agreed to open a monthly credit account for the carriage of coal upon condition that they should have a lien upon all waggons, goods, minerals, etc., conveyed on their line, or which should be at any

### I. Generally—Continued.

time upon the railway or upon any ground rented from the company, for all rates and charges payable to the company, the latter to be at liberty to sell and dispose of any such waggons, goods, minerals, etc., in order to satisfy the lien. The account being in arrear, the company gave the notice agreed, and, in exercise of their lien, took possession of the coal both on the land and in the trucks on the sidings. The coal merchant shortly afterwards was adjudicated bankrupt. His trustee in bankruptcy brought an action against the railway company to recover damages for wrongfully trespassing and seizing the goods, alleging that the agreement was a bill of sale, and was void for want of registration, and that the act of the company brought about the bankruptcy.

HELD (Lords Robertson and Collins dissenting)—that the agreement was not a licence to take possession of goods within sect. 4 of the Bills of Sale Act, 1878, the company having retained by the agreement a certain degree of possession of the coal; and that therefore the agreement was not a bill of sale, and that the plaintiff could not recover.

Decision of C. A. ([1908] 2 K. B. 54; 77 L. J. K. B. 611; 98 L. T. 910; 24 T. L. R. 470; 52 Sol. Jo. 394; 15 Manson, 107) reversed.

GREAT EASTERN RY. CO. v. LORD'S TRUSTEE [1909] A. C. 109; 78 L. J. K. B. 160; 100 L. T. 130; 25 T. L. R. 176; 16 Manson, 1—H. L.

### II. REGISTRATION.

2. *Defeasance or Condition not Contained in Bill of Sale—Registration Void—Effect—Avoidance of Bill—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (3)—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), ss. 8, 9.*—A condition not contained in a bill of sale, otherwise duly registered in proper form, but communicated to the grantor before the completion of the loan transaction, has the effect, not only of avoiding the registration under sect. 10 (3) of the Bills of Sale Act, 1878, so as to make the bill of sale void under sect. 8 of the Bills of Sale Act (1878) Amendment Act, 1882, in respect of the personal chattels contained therein, but of making the bill of sale wholly void under sect. 9 of the Act of 1882, so as to render a covenant to pay interest contained therein unenforceable.

Decision of Grantham, J., affirmed.

SMITH v. WHITEMAN AND ANOTHER. [1909] 2 K. B. 437; 78 L. J. K. B. 1073; 100 L. T. 770—C. A.

### III. SEIZURE.

[No paragraphs in this vol. of the Digest.]

### IV. STATUTORY FORM.

See also II., *supra*.

3. *Consideration not Truly Stated—Attestation by One of the Parties—Contemporaneous Agreement—Agreement not put on the Bill of Sale—Declaration of Trust—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10 (3)—Bills of Sale Act*

(1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 10.]—K. and P. each advanced £100 to F., who in pursuance of a previous arrangement gave P. a bill of sale on furniture belonging to F. to secure £200, which was expressed in the bill of sale to have been paid by P. to F., whereas in fact K. paid his £100 direct to F. K., who acted as the solicitor of F., himself attested the bill of sale, and retained it. He also had given him at the same time a letter signed by P. and addressed to K. stating that the bill of sale was in fact to secure the £100 advanced by K., and undertaking to transfer the bill of sale to K. The bill of sale was registered, but the letter was not written upon or annexed to it. F. became bankrupt.

In an action brought by K. against P. and F. to enforce his security:

HELD—that the bill of sale was void as regards the assignment of the chattels because, first, the contemporaneous letter was a declaration of trust which should have been written on the same paper as the bill of sale before registration; secondly, the letter being a declaration of trust must be deemed to be part of the bill of sale, and K. was therefore a party to the bill, and his attestation of it irregular; and, thirdly, the consideration for the bill was untruly stated in it.

In *re Smith, Ex parte Turbuck* ([1894] 72 L. T. 59; 43 W. R. 206) distinguished.

KINNERSLEY v. PAYNE, 100 L. T. 229—War-  
[ington, J.]

4. *Terms Agreed to for Maintenance of Security—Chattels not to be Removed Without Consent of Grantee—Chattels used in Business—Power to Seize—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), ss. 7, 9.*—A bill of sale granted by the defendants, who were furniture removers, contained a clause that the grantors would not without the consent in writing of the grantee remove the chattels thereby assigned from the premises where they were or from any other place where they might at any time be. A further clause provided that the grantors should repair, replace, and insure the chattels assigned and pay the rent, rates, and taxes of the premises where they were, and that on their failure to do so the grantee might make these payments; and all the moneys so expended by the grantee, with 5 per cent. interest thereon, were to be repaid by the grantors, and until repayment were to be a charge on the chattels assigned. A further clause gave a power to seize the chattels in any of the events specified in sect. 7 of the Bills of Sale Act, 1882, but not otherwise. The chattels assigned were pantech-nicon and other vans and horses used in the defendants' business.

HELD—that the insertion of the foregoing clauses did not invalidate the bill of sale, and that the clause prohibiting the removal of the assigned chattels referred to removal to other premises and did not prohibit the taking out of those chattels in the ordinary course of the defendants' business.

Topley v. Corsbie ((1888), 20 Q. B. D. 350;

**IV. Statutory Form—Continued.**

57 L. J. Q. B. 271 ; 58 L. T. 342 Div. (C.) followed.

HARRISON v. SHALLIS & Co., 25 T. L. R. 664—  
[Channell, J.]

**BIRTH, PROOF OF.**

*See* EVIDENCE.

**BIRTHS, DEATHS & MARRIAGES (REGISTRATION OF).**

*See* EXECUTORS AND ADMINISTRATORS ;  
HUSBAND AND WIFE ; INFANTS ;  
MEDICINE AND PHARMACY.

**BISHOPS.**

*See* ECCLESIASTICAL LAW.

**BLACKMAIL.**

*See* CRIMINAL LAW AND PROCEDURE.

**BLASPHEMY.**

*See* CRIMINAL LAW AND PROCEDURE.

**BOARDING-HOUSES.**

*See* INNS AND INNKEEPERS ; LANDLORD  
AND TENANT.

**BONDS.**

[No paragraphs in this vol. of the Digest.]

*See also* BANKRUPTCY, No. 32 ; BILLS OF  
EXCHANGE ; DEATH DUTIES, No. 7 ;  
DEEDS AND OTHER DOCUMENTS ;  
EXECUTORS AND ADMINISTRATORS ;  
LIMITATION OF ACTIONS, Nos. 2, 3 ;  
PRACTICE, No. 28.

**BOOKS, ENTRIES IN.**

*See* BANKERS AND BANKING ; DIS-  
COVERY ; EVIDENCE.

**BOROUGH AUDITORS.**

*See* ELECTIONS.

**BOROUGHES.**

*See* LOCAL GOVERNMENT.

**BOTTOMRY.**

*See* SHIPPING AND NAVIGATION.

**BOUGHT AND SOLD NOTES.**

*See* STOCK EXCHANGE.

**BOUNDARIES AND FENCES.**

[No paragraphs in this vol. of the Digest.]

**BRANDY.**

*See* FOOD AND DRUGS.

**BRAWLING.**

*See* CRIMINAL LAW ; ECCLESIASTICAL  
LAW.

**BREACH OF PROMISE OF MARRIAGE.**

*See* CONFLICT OF LAWS ; HUSBAND AND  
WIFE.

**BREACH OF THE PEACE.**

*See* CRIMINAL LAW AND PROCEDURE.

**BREAD.**

*See* FACTORIES AND WORKSHOPS ; FOOD  
AND DRUGS.

**BRIBERY.**

*See* AGENCY ; CRIMINAL LAW AND  
PROCEDURE ; ELECTIONS.

**BRIDGES.**

*See* HIGHWAYS, STREETS AND BRIDGES.



**BRITISH COLUMBIA.**

*See* DEPENDENCIES AND COLONIES.

**BRITISH SOUTH AFRICA.**

*See* DEPENDENCIES AND COLONIES.

**BROKERS.**

*See* AGENCY: SALE OF GOODS; STOCK EXCHANGE.

**BROTHELS.**

*See* CRIMINAL LAW AND PROCEDURE.

**BUILDERS, BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS.****I. ARCHITECTS.**

[No paragraphs in this vol. of the Digest.]

**II. BUILDING CONTRACTS.**

[No paragraphs in this vol. of the Digest.]

**I. ARCHITECTS.**

[No paragraphs in this vol. of the Digest.]

**II. BUILDING CONTRACTS.**

[No paragraphs in this vol. of the Digest.]

**BUILDING SOCIETIES.****I. RULES.**

[No paragraphs in this vol. of the Digest.]

**II. WINDING-UP.**

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**III. IN GENERAL.****"BUILDINGS."**

*See* LOCAL GOVERNMENT; METROPOLIS.

**BURIAL AND CREMATION.****I. BURIAL GROUNDS . . . . . COL. 52****II. CHURCHYARDS . . . . . COL. 52**

[No paragraphs in this vol. of the Digest.]

**III. DISUSED BURIAL GROUNDS . . . . . COL. 52****IV. EXHUMATION OF REMAINS . . . . . 52**

[No paragraphs in this vol. of the Digest.]

*See also* ECCLESIASTICAL LAW; LOCAL GOVERNMENT.

**I. BURIAL GROUNDS.**

1. *Poor Rate—Occupation—Burial Ground Provided under Church Building Acts—Liability of Incumbent to Poor Rate in Respect of Profit Derived from Burial Ground—Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30), s. 1.*

—A burial ground which has been duly consecrated is not exempt from rates under the Poor Rate Exemption Act, 1833. And an incumbent in whom the freehold of such a burial ground is vested, and who receives a profit from fees in respect of grants of exclusive right of burial and the like therein, is liable as the occupier of the ground to poor rates.

Decision of C. A. ([1908] 1 K. B. 835; 77 L. J. K. B. 661; 98 L. T. 781; 72 J. P. 172; 24 T. L. R. 388; 6 L. G. R. 427) affirmed.

WINSTANLEY *v.* NORTH MANCHESTER OVER-SEERS, [1909] W. N. 233; 101 L. T. 616; 26 T. L. R. 90; 54 Sol. Jo. 80—H. L.

**II. CHURCHYARDS.**

[No paragraphs in this vol. of the Digest.]

**III. DISUSED BURIAL GROUNDS.**

2. *Unconsecrated Ground Closed by Order in Council—Vested in Rector and Churchwardens—Right to Administer Income—Parish—Vestry—Borough Council—Church Property—Burial Act, 1857 (20 & 21 Vict. c. 81), s. 24—London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 23.*—Where ground originally purchased for the purposes of a cemetery, but never consecrated, is vested in the rector and churchwardens of a parish, but the income derived from any lease thereof is by the Burial Act, 1857, s. 24, to be applied for the purposes of the parish as the vestry may direct, this power of the vestry is not a power relating to the affairs of the church within sect. 23 of the London Government Act, 1899, and is consequently transferred to the borough council under sect. 4 of the last-mentioned Act.

Decision of Warrington, J. ([1908] 2 Ch. 600; 99 L. T. 520; 72 J. P. 413) affirmed, Buckley, L.J., dissenting.

WESTMINSTER CORPORATION *v.* RECTOR, ETC., [OF ST. GEORGE, HANOVER SQUARE, [1909] 1 Ch. 592; 78 L. J. Ch. 581; 100 L. T. 546; 73 J. P. 259; 25 T. L. R. 393; 53 Sol. Jo. 357; 7 L. G. R. 77—C. A.

3. *Faculty—Erection of Choir Vestry.*—Faculty granted for the erection of a choir vestry on part of disused burial ground.

ST. MARGARET, LOTHBURY (RECTOR, ETC.) *v.* [LONDON COUNTY COUNCIL, [1909] P. 310; 25 T. L. R. 734—Dr. Tristram, K.C.

**IV. EXHUMATION OF REMAINS.**

[No paragraphs in this vol. of the Digest.]

**BUTTER.**

*See* FOOD AND DRUGS.

**BYE-LAWS.**

*See* COMPANIES; FISHERIES; HIGHWAYS; LOCAL GOVERNMENT; MARKETS AND FAIRS; METROPOLIS; OPEN SPACES; PUBLIC HEALTH; RAILWAYS; TRAMWAYS; WEIGHTS AND MEASURES.

**CABS.**

*See* METROPOLIS; STREET TRAFFIC.

**CANADA.**

*See* DEPENDENCIES AND COLONIES.

**CANALS.**

*See* HIGHWAYS; RAILWAYS AND CANALS.

**CAPE COLONY.**

*See* DEPENDENCIES AND COLONIES.

**CAPITAL AND INCOME.**

*See* SETTLEMENTS; TRUSTS; WILLS.

**CAPTURE.**

*See* CONFLICT OF LAWS; INSURANCE.

**CARDS.**

*See* GAMING AND WAGERING.

**CARGO.**

*See* SHIPPING AND NAVIGATION.

**CARRIAGE OF PASSENGERS.**

*See* NEGLIGENCE; RAILWAYS.

**CARRIERS.**

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*See also* BAILMENT; SHIPPING, V.

**I. RIGHTS AND LIABILITIES.**

1. *Furniture Remover—Common Carrier—Lien.*—A carman and furniture remover, who is prepared to enter into contracts for the carrying and removal of furniture, but who does not hold himself out to carry furniture for anybody who may bring it to him, on any reasonable terms that may be offered, is not a common carrier, and has no lien for his charges on goods he has carried or removed for a third party against the true owner of the goods.

ELECTRIC SUPPLY STORES *v.* GAYWOOD, 100 [L. T. 855—Pickford, J.]

2. *Ship—Passenger—Loss of Luggage—Felonious Act of Servant—Conditions on Ticket.*—The plaintiff was a passenger by the defendants' steamship, and while on board she lost some of her luggage, as she alleged, by the felonious act of one of the defendants' servants. The ticket which had been issued to her by the defendants contained the following condition:—"The steamer, her owners, and/or charterers are not responsible for any loss, damage, injury, delay, detention . . . of or to passengers or their baggage or effects . . . by whatsoever cause or in whatever manner the matters aforesaid may be occasioned and whether arising from the act of God, King's enemies . . . collision, fire, thieves (whether on board or not) . . . or from any act, neglect, or default whatsoever of the pilot, master, mariners, or other servants of the steamer, her owners and/or charterers, or from restriction of quarantine, or from sanitary regulations or precautions which the ship's officers or local government authorities may deem necessary, or the consequences thereof, or otherwise howsoever; the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage, and effects, including risks of embarking and disembarking, and whether by boat or otherwise."

HELD—that even assuming the loss of the plaintiff's luggage was occasioned by the felonious act of a servant of the defendants the above-quoted condition was wide enough to protect the defendants from liability.

**I. Rights and Liabilities—Continued.**

HELD ALSO, on the facts—that the defendants had taken reasonable steps to bring the conditions on the ticket to the notice of the plaintiff.

MARRIOTT *v.* YEOWARD BROTHERS, [1909] 2 [K. B. 987; 101 L. T. 394; 25 T. L. R. 755; 53 Sol. Jo. 790; 14 Com. Cas. 279—Pickford, J.

**II. RAILWAYS.****(a) Passengers' Luggage.**

See BAILMENT, No. 2.

**(b) Carriage of Animals.**

[No paragraphs in this vol. of the Digest.]

**(c) Carriage of Goods.**

See also RAILWAYS, I. (b) (ii.).

**3. Goods on Premises of Railway Company—Licence to Take Possession—Tenancy—Lien of Company—Unregistered Bill of Sale—Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 4.]—**A railway company let to a coal merchant a certain piece of land at a rental for the purpose of stacking coal unloaded from trucks on the company's sidings. The land adjoined the railway sidings, and was within the company's yard, the gates of which were closed during certain hours of the night. By certain agreements between the company and the coal merchant the company agreed to open a monthly credit account for the carriage of the coal merchant's coal upon condition that they should have a lien upon all waggons, goods, minerals, etc., conveyed on their line, or which should be at any time upon the railway or upon any ground rented from the company, for all rates and charges payable to the company. The account being in arrear, the company, in exercise of their lien, took possession of the coal lying on the rented land.

HELD (Lords Robertson and Collins dissenting)—that the agreement was not a licence to take possession of goods within sect. 4 of the Bills of Sale Act, 1878, the company having already a certain degree of possession of the coal; and that therefore the agreement was not a bill of sale.

Decision of C. A. ([1908] 2 K. B. 54; 77 L. J. K. B. 611; 98 L. T. 910; 24 T. L. R. 470; 52 Sol. Jo. 394; 15 Manson, 107) reversed.

GREAT EASTERN RY. CO. *v.* LORD'S TRUSTEE, [1909] A. C. 109; 78 L. J. K. B. 160; 100 L. T. 130; 25 T. L. R. 176; 16 Manson, 1—H. L.

**CEMETERY.**

See BURIAL AND CREMATION.

**CERTIFICATES.**

See COMPANIES; EVIDENCE; HIGHWAYS.

**CERTIORARI.**

See CROWN PRACTICE.

**CEYLON.**

See DEPENDENCIES AND COLONIES.

**CHAMPERTY.**

See ACTION.

**CHANNEL ISLANDS.**

See DEPENDENCIES AND COLONIES.

**CHARGING ORDER.**

See ADMIRALTY; BANKERS AND BANKING; BANKRUPTCY AND INSOLVENCY; PRACTICE.

**CHARITIES.**

COL.

**I. ADMINISTRATION OF CHARITABLE TRUSTS.**

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**II. CHARITABLE GIFTS.**

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See also FRIENDLY SOCIETIES, No. 1; INCOME TAX, No. 2; TRUSTS; WILLS.

**I. ADMINISTRATION OF CHARITABLE TRUSTS.****(a) Generally.**

**1. Land—Registration—Entry of Restriction on Register—Religious Society—Wesleyan Methodist Chapel—Model Deed—Non-Capitalisation of Donations—Charitable Trusts Acts, 1853 (16 & 17 Vict. c. 137), s. 62, and 1855 (18 & 19 Vict. c. 124), s. 62—Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65).]**—Clause 36 of the model deed for Wesleyan Methodist chapels provides that the proceeds of the sale of land subject to the trusts of the model deed may be applied towards the preaching of the Gospel among Methodists of the particular circuit or for the purpose of acquiring another chapel or otherwise as therein mentioned.

HELD—that by virtue of the above clause there is no capitalisation of the money derived from donations applied in establishing a Wesleyan chapel under trusts of the model deed; that, so



### I. Administration of Charitable Trusts—Continued.

long as a chapel be registered as a place of meeting for religious worship, the restriction upon selling imposed by sect. 29 of the Charitable Trusts Act, 1855, does not apply either to the site of a chapel or to land freshly acquired in exchange for land subject to the trusts of the model deed; and that chapel trustees are entitled to be registered as absolute owners of such land freshly acquired without an entry on the register of any restrictions.

IN RE WESLEYAN METHODIST CHAPEL IN [SOUTH STREET, WANDSWORTH, [1909] 1 Ch. 454; 78 L. J. Ch. 414—Joyce, J.

### 2. Fund Subscribed for a Particular Purpose—Application of Surplus to Similar Purposes—Cy-près.]—A fund was subscribed for the relief of the widows and orphans of six fishermen who were drowned. The fund was vested in trustees who proposed to treat part of it as a permanent fund for the relief of similar cases of distress.

HELD—that until a surplus was proved to exist the trustees were not entitled to apply any part of the fund in the proposed manner.

CROSS v. LLOYD GREAME, 54 Sol. Jo. 152—[Eve, J.]

3. Old Charity—Almshouses—Removal to Country—Inquiry Ordered—Application by Local Inhabitants.]—Where certain inhabitants of S., on behalf of themselves and of other inhabitants of S. interested in a charity which was created by will in 1703, and as to which in this action, commenced in 1707, to which the Attorney-General was a party, an inquiry had been recently ordered with regard to the removal from S. of certain almshouses, applied to be served with notice of all proceedings in the matter and for liberty to attend the inquiry, the application was dismissed on the grounds that the public were already represented by the Attorney-General and that the applicants had no better right than similar applicants on behalf of all phases of thought in the country.

IRONMONGERS' COMPANY v. ROBERTS, Times, [June 24th, 1909—Neville, J.]

### (b) Schemes.

4. Land of Charity Compulsorily Purchased—Costs of Obtaining New Scheme—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.]—A county council compulsorily purchased, under the Lands Clauses Consolidation Act, 1845, land belonging to a charity, and consequently the trustees of the charity applied to the Charity Commissioners for a new scheme for the administration of the charity.

HELD—that the costs of obtaining the new scheme incurred by the trustees fell under sect. 80 of the Lands Clauses Consolidation Act, 1845, and were therefore payable by the county council.

IN RE WOOD GREEN GOSPEL HALL CHARITY, [EX PARTE MIDDLESEX COUNTY COUNCIL, [1909] 1 Ch. 263; 78 L. J. Ch. 193; 100 L. T. 194—Warrington, J.]

5. Power to Make Payments to Charities out of the Jurisdiction.]—A scheme for the administration of a charity, which had been sanctioned by the Court, contained a clause which provided that the income of the charity should be applied for the benefit of a certain hospital "or such other medical charity or charities of any kind, school, or teaching whatsoever, and partly or exclusively to one or other of such objects as the trustees might in their uncontrolled discretion from time to time determine.

HELD—that the expression "medical charity or charities" was limited to medical charities within the jurisdiction; and, therefore, that the trustees were not entitled to make payments to medical charities in Scotland.

IN RE MIRRELES CHARITY, MITCHELL v. ATTORNEY-GENERAL, [1909] W. N. 227; 101 L. T. 549; 26 T. L. R. 77—Joyce, J.

## II. CHARITABLE GIFTS.

See also WILLS, XXVIII., and No. 46.

### (a) Generally.

6. Gift for Particular Purpose—Failure—Devotion to Charitable Purposes—Application Cy-près.]—A testator, by his will, gave a sum of £25,000 to the Institute of Medical Sciences Fund, University of London, which was in process of formation. The £25,000 was paid over to the trustees of the fund. The scheme for the establishment of the Institute was abandoned, and the subscriptions returned, including the £25,000, to the executors of the testator.

HELD—that the legacy of £25,000 was not given for charitable purposes generally, but was given to aid a particular scheme contingently upon that scheme being carried out, and that therefore it could not be applied cy-près.

In re Slevin, Slevin v. Hepburn ([1891] 2 Ch. 236; 64 L. T. 311; 39 W. R. 578—C. A.) distinguished.

Decision of Joyce, J. ([1908] W. N. 182; 99 L. T. 545; 24 T. L. R. 820; 52 Sol. Jo. 682) affirmed.

IN RE UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND, FOWLER v. ATTORNEY-GENERAL, [1909] 2 Ch. 1; 78 L. J. Ch. 562; 100 L. T. 423; 25 T. L. R. 358; 53 Sol. Jo. 302—C. A.

7. Bequests for Charitable Purposes—Maintenance of Memorial in Crypt of Cathedral—Maintenance of Tomb—Bequest for Improving Condition of Soldiers.]—A testatrix bequeathed to the Dean and Chapter of St. Paul's Cathedral £200 upon trust to apply the income thereof in the maintenance and upkeep of a memorial tablet in the crypt of the Cathedral. She also bequeathed £1,800 to the trustees of the Royal Engineers' Institute to apply one-third of the income thereof towards the maintenance of her son's tomb in Middelburg Cemetery, and as to the remaining two-thirds upon trust to apply the same in providing prizes for competition among Royal Engineer cadets or officers. She also declared that the legacy of £1,800 was conditional upon the trust for the one-third of the

## II. Charitable Gifts—Continued.

income being applied to the upkeep of her son's tomb being faithfully observed, and in the event of the condition being broken the legacy was to pass to the trustees or treasurers of the Union Jack Club for the upkeep of bedrooms and attendance for the use of men of the Royal Engineers.

**HELD**—that the bequest for the maintenance and upkeep of the memorial tablet in the crypt of St. Paul's Cathedral was valid as a good charitable bequest; that the bequest of two-thirds of the income of the £1,800 was a good charitable bequest; but that the bequest of the remaining one-third of the income of the £1,800 for the maintenance of the testatrix's son's tomb was void and that it was not forfeitable to the trustees of the Union Jack Club, but fell into the residue.

*Seemle*, the gift to the Union Jack Club would have been a good charitable gift on the ground that the club tended to improve the condition of soldiers.

IN RE SUSANNAH D. BARKER, DECEASED.  
SHERINGTON v. DEAN AND CHAPTER OF  
ST. PAUL'S CATHEDRAL AND OTHERS, 25  
[T. L. R. 753—Warrington, J.]

8. *Gift to Editors of Missionary Periodical—Gift in Furtherance of Missions—Uncontrolled Discretion of Donees.*—The testatrix, by her will, gave the residue of her estate upon trust to convert and hold the same "in trust for W. H. B. and R. E. S., or the survivor of them or other the editors of the missionary periodical called *Echoes of Service*, to be applied by them or him for the furtherance of missions in Central Africa in such manner as the editors in their uncontrolled discretion may think fit for the use of the Brethren labouring there." *Echoes of Service* was a Christian missionary periodical containing records of the work of "the Brethren" in foreign countries.

**HELD**—that the gift was a good charitable bequest.

IN RE REDISH, ARMFIELD-MARROW v. BENNET,  
[26 T. L. R. 42—Joyce, J.]

9. *Legacy to Hospital to "Found a Bed"—Investment of Legacy.*—Where a legacy is given to a hospital for the purpose of establishing a bed to bear a specified name, the sum bequeathed must be invested and the income thence arising applied to the needs of the bed, whatever be the precise language used, if an intention appears that the sum should be treated as capital.

ATTORNEY-GENERAL v. BELGRAVE HOSPITAL,  
[1909] W. N. 211; 101 L. T. 628; 26 T. L. R.  
40; 54 Sol. Jo. 31—Eady J.]

### (b) Mortmain Acts.

[No paragraphs in this vol. of the Digest.]

### (c) Uncertainty.

10. *Gift to Holder of Religious Office—Absolute Discretion as to Selection of Objects in Connection with Roman Catholic Faith.*—The mere fact that a trustee to whom a testator leaves property

for purposes specified to be charitable or religious is a person holding a religious office or is the head of a charitable institution is not sufficient to enable the Court to hold all the trusts and purposes to be "charitable."

A testator by his will gave his real and personal estate to his executors upon trust for conversion and sale, and after giving certain legacies he directed them to hold the residue "in trust for the said Roman Catholic Archbishop of Westminster for the time being to be distributed and given by him at his absolute discretion between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit."

**HELD**—that the gift was void for uncertainty as there was nothing to prevent the gift being applied to non-religious or non-charitable purposes, there being no body of beneficiaries who could invoke the aid of the Court.

Decision of Eady, J. affirmed.

IN RE DAVIDSON, MINTY v. BOURNE, [1909]  
[1 Ch. 567; 78 L. J. Ch. 437; 99 L. T. 222;  
24 T. L. R. 760; 52 Sol. Jo. 621—C. A.]

11. *Practice—Inquiry as to Object of Bequest—Summons to Vary Certificate—Discharge of Certificate Cy-près.*—A testatrix made a charitable bequest to an uncertain object, and the Court directed an inquiry as to what charity the testatrix meant. The Master certified that a certain charity was the one meant, and another charity took out a summons to vary the certificate by substituting itself as the one meant.

**HELD**—that the Court was not bound to decide in favour of either of the two charities, but could discharge the certificate and order the fund to be applied *cy-près*.

IN RE LEWIS HILL, DAVIES v. NAPPER, 53 Sol.  
[Jo. 228—Eve, J.]

12. *Bequest—Charitable Purposes—Uncertainty.*—A testator by his will gave the residue of his estate in the following terms:—"I desire that my executors, with the assistance of Mr. J. R. H., Mr. —, the art master, and any persons they may call in to assist them, shall expend the said residue in any manner they may think desirable to encourage artistic pursuits or assist needy students in art. And, finally, if any differences of opinion arise, then the decision of my executors shall be final and binding."

**HELD**—that it was not a good charitable gift.

IN RE OGDEN, TAYLOR v. SHARP, 25 T. L. R.  
[382—C. A.]

13. *Trust for—"Civil or Religious Purposes."*—A trust "for such purposes civil or religious" as the trustees shall appoint fails as a charitable trust by reason of its uncertainty, even though the trustees are and must be members of a particular religious body.

IN RE FRIENDS' FREE SCHOOL, CLIBBORN v.  
[O'BRIEN, [1909] 2 Ch. 675; 101 L. T. 204;  
25 T. L. R. 782; 53 Sol. Jo. 733—Eve, J.]

## II. Charitable Gifts—Continued.

14. "*Charities or Benevolent or Beneficent Institutions*"—[*Scottish Law*.] A bequest to "such charities or benevolent or beneficent institutions" as the trustees "in their sole discretion shall think proper, and in such proportions as they may think proper," was held to be a bequest in favour of charitable objects, the epithets "benevolent or beneficent" being merely exegetical, and not void from uncertainty.

*Hay's Trustees v. Baillie* ([1908] S. C. 1224; 45 Sc. L. R. 908) followed.

*PATERSON'S TRUSTEES v. PATERSON*. [1909] [S. C. 485; 46 Sc. L. R. 406.—Ct. of Sess.

15. "*Charitable or Philanthropic Institutions—Scottish Law*."—A bequest "to such charitable or philanthropic institutions, one or more, in Glasgow or the west of Scotland, as my trustees may select as in their opinion the most deserving, and that in such proportions in the case of their dividing it as they in their sole discretion may consider best," was held to be a bequest in favour of charitable objects, the term "philanthropic" being merely exegetical, and not void from uncertainty.

*Hay's Trustees v. Baillie* ([1908] S. C. 1224; 45 Sc. L. R. 908) and *PATERSON'S TRUSTEES v. PATERSON* (*supra*) followed.

*MACKINNON'S TRUSTEES v. MACKINNON*. [1909] [S. C. 1041; 46 Sc. L. R. 792.—Ct. of Sess.

## CHARTERPARTY.

See SHIPPING AND NAVIGATION.

## CHEQUES.

See BANKERS AND BANKING; CONFLICT OF LAWS.

## CHILDREN.

See BASTARDY; CRIMINAL LAW AND PROCEDURE; EDUCATION; FACTORIES AND WORKSHOPS; INFANTS.

## CHOSES IN ACTION.

See also BANKRUPTCY; CONFLICT OF LAWS; CONTRACTS, ETC.

1. *Assignment of Debt—Ascertained Sum—Portion of Existing Debt*.—An ascertained portion of an existing debt may legally be assigned.

*SKIPPER AND TUCKER v. HOLLOWAY AND* [HOWARD, [1909] W. N. 230; 26 T. L. R. 82—Darling, J.]

## CHURCHES, CHURCH-WARDENS, AND CLERGY.

See ECCLESIASTICAL LAW.

## CHURCHYARD.

See BURIAL AND CREMATION.

## CLEARING HOUSE.

See BANKERS.

## CLERK OF THE PEACE.

See PUBLIC OFFICERS.

## CLUBS.

See also INNS, No. 1.

1. *Expulsion of Member—No Notice of Charge against Member—Injunction*.—The plaintiff claimed a declaration that a resolution expelling him from a club of which he was a member was null and void, and also an injunction restraining the defendants as members of the committee from interfering with him as a member of the club.

HELD—that the plaintiff was entitled to the declaration and injunction claimed inasmuch as no notice was given to him of the charge preferred against him and upon which the defendants purported to act in expelling him, and, therefore, his expulsion was in those circumstances contrary to natural justice.

*GRAY v. ALLISON AND OTHERS*, 25 T. L. R. 531 [—Lawrance, J.]

2. *Rules—Entrance Fee Payable by Instalments—Liability of Eccentric of Deceased Member for Unpaid Instalments*.—W. joined a club and availed himself of a rule that the entrance fee of forty guineas might be paid in instalments of five guineas on election and five guineas on January 1 of each of the succeeding seven years. The rule then provided that "members who elect to pay their entrance fee by instalments will, in the event of ceasing to belong to the club, be liable to pay any balance due in one sum." W. having been killed after having paid one instalment, the trustees of the club sued his executrix for the balance of the entrance fee.

HELD—that the action failed, as the rule was not intended to cover the case of death, but only cases in which a member was to remain under a personal liability.

*DENISON AND OTHERS v. WYNN*, 26 T. L. R. 64 [—Darling, J.]



**COAL.***See* MINES.**COINS AND COINAGE.***See* CRIMINAL LAW.**COLLECTING SOCIETIES.***See* INDUSTRIAL SOCIETIES.**COLLEGES.***See* CHARITIES ; EDUCATION.**COLLISIONS AT SEA.***See* SHIPPING AND NAVIGATION.**COMBINATIONS AFFECTING TRADE.***See* TRADE AND TRADE UNIONS.**COMMISSION.***See* AGENCY ; COMPANIES ; STOCK EXCHANGE.**COMMISSION TO EXAMINE WITNESSES.***See* ADMIRALTY, No. 4 ; EVIDENCE ; PRACTICE AND PROCEDURE.**COMMONS.***See also* CRIMINAL LAW, No. 63.

1. *Conservators of Common—Duty—Quarrying—Commonable Rights—Open Space—Disfigurement*—47 & 48 Vict. c. clxxv. s. 25.]—By the Malvern Hills Act, 1884 (47 & 48 Vict. c. clxxv.), conservators are appointed, the lands subject to the Act are to be preserved as open spaces, any unlawful digging is to be prevented, and new quarries are to be so placed as to cause as little injury and disfigurement to the hills as reasonably practicable.

The lord of a manor in working a quarry placed it so as to cause as little disfigurement to

the hills as reasonably practicable. The spoil-banks were made parallel to the quarry, and were raked down so as to admit their being sown on.

HELD—that there had been no disfigurement, and that the lord of a manor, to whom the soil belongs, has a right to dig for gravel and sand, and to quarry for stone and minerals which lie under the waste for his own profit, as long as he does not materially deprive the commoners of commonable rights.

MALVERN HILLS CONSERVATORS *v.* WHITMORE, 100 L. T. 841 ; 73 J. P. 329—Eady, J.

**COMMONWEALTH OF AUSTRALIA.***See* DEPENDENCIES AND COLONIES.**COMMUTATION OF TITHES.***See* ECCLESIASTICAL LAW.**COMPANIES.**

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See also ADMIRALTY, No. 2; GAMING, No. 12; INDUSTRIAL SOCIETIES; PRACTICE, No. 1; RAILWAYS; TRAMWAYS, No. 4.

## I. AMALGAMATION.

1. *Scheme Unfair to one Company—Resolutions for Winding-up carried by Nominees of another Company Benefited—Dissentient Minority—Agreement for Sale not Executed—Compulsory Order.*—Three companies, C., E., and another, were to be wound up voluntarily and their assets were to be sold to a new company for shares in the latter allotted proportionately to the valued assets of the old companies. The E. company would by the scheme escape direct payment of a large sum due to the C. company, and in the valuation of assets certain mining claims of the C. company, though of considerable prospective value, were reckoned to be of no market value. The scheme was greatly in favour of the E. company and the resolutions for winding-up the C. company were carried by a majority almost entirely made up of the E. company and their nominees. No agreement for the sale had been actually executed. On a petition for the compulsory winding-up of the C. company by the minority of independent shareholders opposed to the scheme:—

HELD—that the justice of the case required that a compulsory order should be made so that the scheme should not be carried through without the sanction of the Court.

IN RE CONSOLIDATED SOUTH RAND MINES [DEEP, LD., [1909] 1 Ch. 491; 78 L. J. Ch. 326; 100 L. T. 319; 16 Manson. 81 Eady, J.

## II. ARTICLES OF ASSOCIATION.

## (a) General.

[No paragraphs in this vol. of the Digest.]

## (b) Alteration.

2. *Retrospective Effect—Creation of Lien on All Shares for Unpaid Calls—Prior Transfer of Fully-paid Shares—Right of Transferee to Registration as Holder of Unburdened Shares—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 50.*

—A holder of fully-paid and of partly-paid shares in a company which had, under its articles of association, a lien on all partly-paid shares for calls due on them, transferred the fully-paid shares to A. The company refused to enter A's name on the register, and thereafter, by special resolution duly confirmed, altered the articles of association so as to give the company a lien on all shares registered in the name of any member for calls due on any of his shares.

HELD—that A.'s right to be registered as the holder of unburdened shares could not be

defeated by the subsequent alteration in the articles of association, and that A. was entitled to be entered on the register as at the date of his application.

LIQUIDATOR OF W. & A. MARTHUR, LD. v. [GULF LINE, LD., [1909] S. C. 732; 46 Sc. L. R. 497—Ct. of Sess.

## III. ASSOCIATIONS NOT FOR PROFIT.

3. *Memorandum—Power to Pension Secretary.*

—The memorandum of association of a club which was incorporated under the Companies Acts, but not for the purposes of gain, provided that the club's income and property should be applied solely towards the promotion of the objects of the club as set forth, and no portion thereof was to be "paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the club. Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the club, or to any member of the club or other person in return for any services actually rendered to the club."

HELD—that a payment to a retired secretary and member of the club by way of annuity, pension, or gratuity was within the powers of the club as being in furtherance of its objects and interests.

CYCLISTS' TOURING CLUB v. HOPKINSON, [1909] [W. N. 260; 26 T. L. R. 117; 54 Sol. Jo. 134 —Eady, J.

## IV. AUDITORS.

[No paragraphs in this vol. of the Digest.]

## V. BORROWING.

4. *Income Bonds—Bonus Payable out of Profits—No Profits—Issue of Shares in Exchange for Bonus—Payment of Dividends out of Capital—Issue of Shares at Discount—Ultra Vires.*—In October, 1904, a company raised in pursuance of the powers conferred by their articles a sum of £50,000 by means of income bonds. By each of these bonds the corporation contracted that they would, so far as there were net profits of the corporation available for the purpose, pay to the bondholders the principal sum of £10 advanced on the bond, together with the sum of £25 by way of bonus with respect to each such bond. Clause 2 of the operative part of the bond provided that the principal money and bonus were payable exclusively out of net profits, and were to be paid in equal instalments of £5 extending over seven years. Clause 4 provided that the registered holder of ten bonds should have the option of converting the principal money into a first mortgage debenture for £100 as provided by the conditions. The conditions provided (*inter alia*) that the company might at any time after December 31st, 1906, give notice in writing to the bondholders of its intention to pay off the bonds; and, upon the expiration of six months from such notice the principal money, if not converted, and bonus should become payable. The company had not been successful, and most of the bonds had been converted into first



### V. Borrowing—Continued.

mortgage debentures. The company expecting shortly to make large profits desired to get rid of the income bonds. An arrangement, therefore, was come to with the majority of the income bondholders to discharge the capital which remained unpaid by a cash payment, and to discharge the bonus of £25, amounting to £125,000, in new fully-paid shares of the company, and resolutions to that effect were passed by the bondholders.

HELD—that what was proposed to be done was in substance a payment of dividends out of capital and also an issue of shares at a discount, and therefore contrary to the provisions of the Companies Acts and *ultra vires* of the company.

Decision of Parker, J. reversed.

BURY v. FAMATINA DEVELOPMENT CORPORATION, LD., [1909] 1 Ch. 754; 78 L. J. Ch. 508; 100 L. T. 703; 16 Manson, 138—C. A.

### VI. CAPITAL.

See No. 4, *supra*; Nos. 37, 41, 42, 54, *infra*; REVENUE, Nos. 5, 6, 7.

### VII. COMMISSION ON ACCEPTANCE OF SHARES.

[No paragraphs in this vol. of the Digest.]

### VIII. CONTRACTS.

#### (a) Pre-incorporation Contracts.

5. *Preliminary Expenses—Registration and other Statutory Fees—Payment by Promoter—Liability of Company—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 17, ]—A person who pays the registration and other statutory fees on the registration of a company is in no better position than a person who has made any ordinary payment on behalf of the company, and is not entitled in the absence of some request by the company to be repaid by the company.

Judgment of Buckley, J., in *In re English and Colonial Produce Co.* ([1906] 2 Ch. 435; 95 L. T. R. 85) overruled.

Decision of Eady, J. affirmed.

IN RE NATIONAL MOTOR MAIL COACH CO., LD., [CLINTON'S CLAIM, [1908] 2 Ch. 515; 77 L. J. Ch. 790; 99 L. T. 632; 15 Manson, 362—C. A.

#### (b) Provisional Contracts.

[No paragraphs in this vol. of the Digest.]

#### (c) Ultra Vires.

[No paragraphs in this vol. of the Digest.]

### IX. DEBENTURES.

See also No. 4, *supra*; Nos. 22, 23, 48, *infra*; BANKERS, No. 7; INTOXICATING LIQUORS, No. 5.

#### (a) General.

6. *Redeemable Debenture Stock—Conversion into Irredeemable Stock—Resolution by Majority of Stockholders—Power of Majority to Bind*

*Minority—“Redeemable” “Irredeemable” —Ultra vires.*]—Where under a trust deed a majority of the debenture stockholders had power to sanction any modification of the rights of the stockholders as against the company, and the majority passed a resolution agreeing to convert their redeemable stock into irredeemable stock.

HELD—that the resolution was not *ultra vires*, and was binding on the minority.

The legal meaning of the words “redeemable” and “irredeemable” considered.

IN RE JOSEPH STOCKS & CO., LD., WILLEY v. STOCKS, 26 T. L. R. 41; 54 Sol. Jo. 31—Eve, J.

7. *Uncalled Capital—Receiver Suing in Name of Liquidator to Recover Calls—Nominee of Debenture-holder.*]—There is no objection to the practice of allowing, in proper cases, the receiver, who has been appointed in a debenture-holders' action against a company in liquidation whose uncalled capital is included in the debenture-holders' security, to use the name of the liquidator, upon giving him a proper indemnity, for the purpose of recovering the calls made by him. There is no precedent for sanctioning the application of a debenture-holder, whose security is upon the uncalled capital of a company, that a person nominated by him with the approval of subsequent debenture-holders should be allowed to recover calls made by the liquidator.

IN RE WESTMINSTER SYNDICATE, LD., [1908] [W. N. 236; 99 L. T. 924; 25 T. L. R. 95—Neville, J.

#### (b) Debenture-holders' Action.

See also No. 23, *infra*.

8. *Security supposed to be Deficient—Dividends—Appropriation to Principal or Interest—Orders Directing Distribution—Subsequent Surplus.*]—A company being in liquidation, it was believed that the assets were not sufficient to pay the principal of the debentures, on which arrears of interest were owing.

Dividends were paid, and in the end the principal was repaid, and there remained a surplus.

HELD—that the debenture-holders, and not the company, were entitled to the surplus; the certificate and orders did not amount to a final appropriation of the dividends to capital, and the debenture-holders were entitled to their arrears of interest.

IN RE CALGARY AND MEDICINE HAT LAND CO., LD., PIGEON v. THE COMPANY, [1908] 2 Ch. 652; 78 L. J. Ch. 97; 99 L. T. 706; 16 Manson, 36—C. A.

9. *Payment out of Court of Sum Recovered—Pending Claims by Company against the Plaintiff—Sum Due to Plaintiff Carried to Separate Account and not Paid Out.*]—A debenture-holder who was the original plaintiff in a debenture-holder's action was also a trustee for the debenture-holders and, as well, a director of the company. The sum recovered in the action had been

**IX. Debentures—Continued.**

paid into court, and in paying it out to the debenture-holders it was proposed to except, and carry to a separate account, the sum due to the original plaintiff on the ground that the company had certain claims against him which were still pending.

**HELD**—that it would not be right for the Court in administering the fund in the debenture-holder's action to part with a share in it to the former plaintiff, or his assignees, until the rights as between him and the company had been ascertained, and that his share of the fund must therefore be carried over to a separate account.

**IN RE RHODESIA GOLDFIELDS, LD., PARTRIDGE**  
[*v. THE COMPANY*, 54 Sol. Jo. 135—Eady, J.]

**10. Practice—Judgment in Default of Defence—No Other Incumbrances Known—Form of Order.**—Where an action by trustees of a debenture trust deed brought against the company to have the trusts carried out comes on as a short cause or motion for judgment in default of defence, and no other incumbrances are known affecting the property comprised in the deed, there should be omitted from the form of judgment as given in Palmer's Company Precedents, Part III., p. 555, form 184 (10th ed.), the words "and in whom the same are vested" at the end of clause 4, and also clauses 5 and 6. If on the inquiry other incumbrances should be discovered application may be made to add the words and clauses omitted.

**IN RE ADDRESSOGRAPH, LD., BACKHOUSE v.**  
[*ADDRESSOGRAPH, LD.*, [1909] W. N. 260—Eady, J.]

**(c) Floating Security.**

[No paragraphs in this vol. of the Digest.]

**(d) Priority.**

**11. Cheque in Payment of Interest—Failure to Present Cheque—Release of Security.**—The mere acceptance of a cheque in payment of interest on debentures, and failure to present the cheque for payment, do not constitute a release of the security.

**IN RE DEFRIES & SONS, EICHHOLZ v. THE**  
[*COMPANY*, [1909] 2 Ch. 423; 78 L. J. Ch. 720;  
101 L. T. 486; 25 T. L. R. 752; 53 Sol. Jo.  
697—Warrington, J.]

**(e) Registration.**

**12. Extension of Time—Debentures not Registered under Companies Act, 1900—Repeal of Section—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 14, 15—Companies Act, 1907 (7 Edw. 7, c. 50), s. 10—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (2).**—Between January 1st, 1901, and July 1st, 1908, a company issued debentures which, by the secretary's inadvertence, were not registered as required by sect. 14 of the Companies Act, 1900, which came into force on January 1st, 1901. Sect. 14 of the Act of 1901 was repealed by sect. 10 of the Companies Act, 1907, which re-enacts the requirements as to registration, but applies only to debentures

issued after July 1st, 1908. Sect. 15 of the Act of 1900, giving the Court power to extend the time for registration, being unrepealed, the company asked for extension of time to have the debentures registered under the Act of 1900. The company's only creditor besides the debenture-holders was its bank.

**HELD**—that the obligation to register the debentures, and the power to extend the time for doing so, were both preserved by sect. 38 of the Interpretation Act, 1889, and that the time should be extended for three weeks provided that the bank's written consent were produced to the registrar.

**IN RE HERTS AND ESSEX WATERWORKS**  
[*Co., LD.*, [1909] W. N. 48—Eady, J.]

**13. Series of Debentures—"Containing any Charge"—Substituted Property—Certificate of Registration—Conclusiveness—Ship Mortgages under Merchant Shipping Act, 1894—Companies Act, 1900 (63 & 64 Vict. c. 48), s. 14.**—A company issued debenture stock, which was secured by a trust deed only, and amongst the assets subject to the deed were certain named steamships, the company having power, with the consent of the trustees of the deed, to withdraw any of the specifically mortgaged property upon substituting other property of equal or greater value. The company filed for registration, under sect. 14 of the Companies Act, 1900, the particulars required in the case of the issue of a series of debentures, except that, by inadvertence, the date of the resolution creating the series was not filed. The registrar gave his certificate of registration, and the certificate was indorsed on each certificate of the debenture stock. The company subsequently executed mortgages of the steamships under the Merchant Shipping Act, 1894, and registered them under that Act.

**HELD**—that the debenture stock was "a series of debentures," that it contained a "charge to the benefit of which the holders of that series" were entitled, as it was sufficient that the trust deed contained the charge; that the certificate of registration was conclusive that the requirements of the section had been complied with; that the registration protected the substituted property; and that therefore sect. 14, sub-sect. 4, of the Companies Act, 1900, had been complied with, and it was not necessary to register the ship mortgages under that Act.

*In re Harrogate Estates, Ltd.* ([1903] 1 Ch. 498; 72 L. J. Ch. 313; 88 L. T. 82; 51 W. R. 334; 19 T. L. R. 246; 10 Manson, 113—Buckley, J.) and *In re Yolland, Husson and Birket* (*supra*), applied.

*Cornbrook Brewery Co. v. Law Debenture Corporation* ([1904] 1 Ch. 103; 73 L. J. Ch. 121; 89 L. T. 680; 52 W. R. 242; 20 T. L. R. 140; 11 Manson, 60—C. A.) distinguished.

**CUNARD STEAMSHIP CO. v. HOPWOOD**, [1908]  
[2 Ch. 564; 77 L. J. Ch. 785; 99 L. T. 549;  
24 T. L. R. 865; 11 Asp. M. C. 147; 15  
Manson, 353—Eady, J.]

**14. Registration—Whether Necessary—Decision how Obtained.**—The Court will not decide

**IX. Debentures—Continued.**

whether registration of a mortgage is or is not necessary upon an originating summons.

IN RE CUNARD STEAMSHIP CO., LD. [1908]  
[W. N. 160; 99 L. T. 549; 11 Asp. M. C. 146  
—Eady, J.]

**(f) Validity.**

[No paragraphs in this vol. of the Digest.]

**X. DEEDS OF ARRANGEMENT.**

[No paragraphs in this vol. of the Digest.]

**XI. DEFUNCT COMPANY.**

[No paragraphs in this vol. of the Digest.]

**XII. DIRECTORS.**

See also No. 46, *infra*; BANKERS, No. 6;  
BILLS OF EXCHANGE, No. 1.

**(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Appointment.**

**15. Notice Convening Meeting—Nature of Business to be Transacted—No Mention of Additional Directors—Sufficiency of Notice.**—The articles of association of a company provided that the notice of a general meeting should specify the general nature of the special business to be transacted. Notice was given of a meeting for the purpose of passing a resolution that three retiring directors whose term of office had expired should be re-elected, with such amendments as should be determined at the meeting. At the meeting an amendment to the resolution was carried appointing two additional directors.

HELD—that the notice sufficiently indicated the business transacted, and that therefore the additional directors were duly appointed.

BETTS & CO., LD. v. MACNAGHTEN, 100 L. T. [922; 25 T. L. R. 552; 53 Sol. Jo. 521—Eve, J.]

**(c) Fiduciary Relation.**

[No paragraphs in this vol. of the Digest.]

**(d) Misfeasance.**

[No paragraphs in this vol. of the Digest.]

**(e) Prospectus.**

[No paragraphs in this vol. of the Digest.]

**(f) Powers.**

See also 17, 18, 33, 35.

**16. Management of Company—Resolution—Dissentient Director—Confirmation at General Meeting—Articles of Association.**—The articles of association of a company provided: "75. The business of the company shall be managed by the board. . . . The board may exercise all the powers of the company, subject, nevertheless, to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions of these articles) as may be prescribed by the company in general meeting. . . ." "80. No resolution of a meeting of the directors

having for its object" certain specific objects "shall be valid or binding unless not less than 24 hours' notice in writing . . . of the meeting . . . shall have been given to each of the managing directors . . . and neither of them shall have dissented therefrom in writing before or at the meeting at which such resolution is put to the vote." At a meeting of the board of directors a resolution on a subject coming within article 80 was passed by two of the directors against one of the managing directors, who thereupon entered a formal objection in writing. The resolution was submitted to an extraordinary general meeting of the company and carried on a poll. The managing director who had objected to the resolution thereupon brought this action to restrain the company and the other two directors from acting upon it.

HELD—that the resolution was invalid, being inconsistent with the articles.

Decision of C. A. ([1909] 1 Ch. 311; 78 L. J. Ch. 367; 100 L. T. 161; 25 T. L. R. 164; 53 Sol. Jo. 150; 16 Manson, 127) affirmed.

QUIN AND AXTESS, LD., AND OTHERS v. [SALMON, [1909] A. C. 442; 78 L. J. Ch. 506; 100 L. T. 820; 25 T. L. R. 590; 53 Sol. Jo. 575; 16 Manson, 230—H. L.]

**(g) Qualification.**

[No paragraphs in this vol. of the Digest.]

**(h) Quorum.**

[No paragraphs in this vol. of the Digest.]

**(i) Remuneration.**

[No paragraphs in this vol. of the Digest.]

**(k) Vacation of Office.**

[No paragraphs in this vol. of the Digest.]

**XIII. DIVIDENDS.**

See No. 4, *supra*; Nos. 41, 42, 54, *infra*.

**(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Payment out of Capital.**

[No paragraphs in this vol. of the Digest.]

**(c) Preference Shares.**

[No paragraphs in this vol. of the Digest.]

**XIV. FLOTATION.**

[No paragraphs in this vol. of the Digest.]

**XV. MANAGEMENT.**

See also No. 16, *supra*.

**17. Powers of Board—Action in Name of Company—Majority of Votes—Motion by certain Directors to Strike out Name of Company as Plaintiffs—Companies Act, 1862 (25 & 26 Vict. c. 89), Table A, art. 55.]**—A company which was governed by the regulations in Table A of the Companies Act, 1862, including art. 55 thereof, was formed with the object of acquiring and working a patent belonging to M. That patent was subsequently sold by M. to and was vested in the plaintiff company, M. receiving therefor a cash payment and certain fully-paid shares. M. and three others were the directors of the company, the four holding among them



**XV. Management—Continued.**

substantially the whole of the subscribed capital. M.'s holding gave him the majority of votes at a general meeting of the company. The directors other than M. having become interested in a patent vested in the defendant company which was alleged to be an infringement of the plaintiff company's patent and was admittedly a competing patent, and having refused to sanction proceedings on behalf of the plaintiff company against the defendant company, M. commenced an action in the name of the plaintiff company against the defendant company to restrain them from infringing the plaintiff company's patent. No meeting had been held to ascertain the wishes of the company, but it was admitted that no object would be gained by calling such a meeting, seeing that M. could command the majority of votes. The three opposing directors having applied on behalf of the plaintiff company that the name of the company might be struck out as plaintiffs on the ground that the name had been inserted without the company's authority:—

**HELD**—that the application must be dismissed as the majority of the shareholders had the right to control the action of the directors in the matter.

**MARSHALL'S VALVE GEAR CO., LD. v. [MANNING, WARDLE & CO., LD., [1909] 1 Ch. 267; 78 L. J. Ch. 46; 160 L. T. 65; 25 T. L. R. 69; 15 Manson, 379—Neville, J.**

**18. Extension of Objects—Amendment of Company's Bye-laws—Duty of Directors—Rights of Dissentient Shareholders—Australian Mutual Provident Society's Act, 1857.**—The Court will not, at the instance of a minority of the shareholders of a company, interfere with its internal management, such as the alteration of its bye-laws for the purpose of extending the business of the company, unless the acts complained of are of a fraudulent nature or are beyond the powers of the company.

The directors of a company do not go beyond their functions in recommending to shareholders the extension of the company's business into new fields; and there is no obligation upon the directors, when circulating among the shareholders their own recommendations, to state the arguments of the dissentient shareholders.

A statutory power to carry on business "in or out of" the colony of New South Wales, **HELD** to authorise an extension of the business to the United Kingdom and British South Africa.

Decision of the Supreme Court of New South Wales (7 S. R., N.S.W., 99) affirmed.

**CAMPBELL v. THE AUSTRALIAN MUTUAL PROVIDENT SOCIETY AND OTHERS, 77 L. J. P. C. 117; 99 L. T. 3; 24 T. L. R. 623; 15 Manson, 344—P. C.**

**XVI. MEETINGS.**

See No. 21, *infra*.

**(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Extraordinary.**

[No paragraphs in this vol. of the Digest.]

**(c) Special Resolution.**

[No paragraphs in this vol. of the Digest.]

**XVII. MEMORANDUM OF ASSOCIATION.****(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Alteration.**

**19. Company Limited by Guarantee—Jurisdiction—Statement in Petition that Guarantee Exceeds £10,000—Companies (Memorandum of Association) Act, 1890 (53 & 54 Vict. c. 62), s. 1 (2) — Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 1.**—The High Court has the jurisdiction of winding-up all companies limited by guarantee, whatever the amount of the guarantee, and consequently by the Companies (Memorandum of Association) Act, 1890, s. 1 (2), the jurisdiction to confirm an alteration in the memorandum of association of any such company. The custom of inserting in such petitions by such companies a statement that the guarantee exceeds £10,000, which is intended to attract the jurisdiction of the High Court by virtue of sect. 1 of the Companies (Winding-up) Act, 1890, is misconceived, as that Act does not mention companies limited by guarantee.

**IN RE MONMOUTHSHIRE AND SOUTH WALES EMPLOYERS' MUTUAL INDEMNITY SOCIETY, LD., [1909] W. N. 6—Neville, J.**

**20. Sanction by Court—Jurisdiction of Chancery Judges—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 9, 131, 132, 285.**—The Companies (Consolidation) Act, 1908, has not affected the jurisdiction of the judges of the Chancery Division to sanction a resolution altering a company's memorandum of association, and has not transferred it to the two judges to whom jurisdiction in the winding-up of companies has been assigned under the Act by the Lord Chancellor.

**IN RE ESSEX AND SUFFOLK EQUITABLE INSURANCE SOCIETY, LD., [1909] W. N. 102—Warrington, J.**

**XVIII. NOTICES.**

**21. Notice of Special Business at Meeting—Appointment of Directors—Sufficiency of Notice calling Meeting.**—The plaintiff company had a board of three directors whose term of office expired in March, 1909. Notice was sent to the shareholders of a meeting to be held on March 19th, for the purpose of passing a resolution that the three directors should be re-elected, with such amendments and alterations as should be determined at the meeting. The articles of association provided that notice of a meeting should specify the general nature of the special business for which the meeting was convened, or which was proposed to be transacted. The articles also provided that the number of the directors should not be more than seven nor less than three. It was admitted that the appointment of additional directors was special business. At the meeting held on March 19th, the notice calling it was treated as read, the resolution was put, and an amendment to appoint the two defendants as additional directors was unanimously carried.

XVIII. *Notes*.—*Continued.*

**HELD**—that the amendment by virtue of which the two defendants were elected as additional directors was sufficiently indicated in the notice convening the meeting.

BETTES & CO., LD. *v.* MACNAGHTEN, 100 L. T. [1922 : 25 T. L. R. 552 : 53 Sol. Jo. 521—Eve, J.]

XIX. **PROMOTERS.**

[No paragraphs in this vol. of the Digest.]

XX. **PROSPECTUS.**(a) **General.**

[No paragraphs in this vol. of the Digest.]

(b) **Liability of Directors.**

[No paragraphs in this vol. of the Digest.]

(c) **Omission to state Material Contract.**

[No paragraphs in this vol. of the Digest.]

XXI. **PROXIES.**

[No paragraphs in this vol. of the Digest.]

XXII. **RECEIVERS.**

*See also* INJUNCTIONS, No. 6.

**22. Custody of Title Deeds—Deeds Held by Trustees for Debenture-holders Convenience—Deposit with Receivers till Further Order.**—

By trust deeds certain freehold and leasehold premises, belonging to a company, were conveyed to trustees for debenture-holders in the company, and the trustees held the title deeds relating to the specific hereditaments comprised in the trust deeds. Receivers having been appointed of the properties comprised in the trust deeds, and also of the undertaking and property of the company, application was made to the trustees by the receivers for delivery to them of the title deeds of the properties. Warrington, J., came to the conclusion that on the ground of convenience and for the proper discharge of the receivers' duties, the deeds should be deposited with them till further order, the receivers to allow the trustees complete access to the deeds and to deliver them over to the trustees upon their undertaking to redeliver them when the specific purpose for which they were taken out was fulfilled.

**HELD**—that the matter was one entirely of discretion, and the Court would not interfere with the order made by the judge.

*Per* Cozens-Hardy, M.R.—In such cases the judge must exercise his discretion in accordance with the special circumstances and requirements of the particular case before him:

Decision of Warrington, J. (25 T. L. R. 726), affirmed.

IN RE IND, COOPE. & CO., LD., FISHER *v.* THE COMPANY, KNOX *v.* THE COMPANY, 26 T. L. R. 11—C. A.

**23. Debenture-holder's Action—Receiver Using Plant Claimed by another Company—Threat of Proceedings in other Courts—Injunction.**—A receiver appointed in a debenture-holder's action carried on the M. company's theatre, and in so doing used electric lighting plant which had been supplied to the M. company by the E.

company on a hire-purchase agreement. The E. company, who had previously obtained judgment in an action with regard to the plant against the M. company, now claimed rent for the use of it from the receiver, and threatened to take proceedings against him in the King's Bench Division, but refused to bring in their claim in the debenture-holder's action. On an application by the receiver:

**HELD**—that the Court would not allow its officer to be subject to an action in another Court with reference to his conduct in the discharge of the duties of his office, and that the E. company must therefore bring in their claim in the debenture-holder's action within fourteen days, and be restrained from commencing any other proceedings against the receiver.

IN RE MAIDSTONE PALACE OF VARIETIES, [LD., BLAIR *v.* MAIDSTONE PALACE OF VARIETIES, LD., [1909] 2 Ch. 283 : 78 L. J. Ch. 739 : 101 L. T. 458 : 16 Manson, 260—Neville, J.]

XXIII. **RECONSTRUCTION.**

**24. Injunction against Old Company—Reconstruction of Company—New Company taking over Assets of Old Company—Application against New Company for Breach of Injunction.**—An injunction was obtained by the plaintiff against a company, restraining them, their servants and agents, from soliciting the custom of persons who before the sale of a certain part of their business to the plaintiff were their customers. Thereafter the company went into voluntary liquidation, and a new company was formed under the same name, to which were transferred the assets and business of the old company.

**HELD**—that as the reconstruction of the old company had been regularly carried out for the sake of obtaining new capital and not colourably for the sake of evading the order, the new company became an independent company and was in no sense the servant or agent of the old, and therefore in soliciting a customer of the plaintiff the new company committed no breach of the injunction which had been obtained.

BOSCH *v.* SIMMS MANUFACTURING CO., LD., [25 T. L. R. 419—Eady, J.]

XXIV. **REDUCTION OF CAPITAL.**(a) **General.**

[No paragraphs in this vol. of the Digest.]

(b) **Loss of Capital.**

**25. Practice—Petition—No Evidence of Loss of Capital Required—Companies Act, 1877 (40 & 41 Vict. c. 26), s. 3—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 46 (1).**—On a petition for confirmation of a proposed reduction of capital no evidence of loss of capital is necessary. Sect. 46 (1) of the Companies (Consolidation) Act, 1908, has made it clear that the special instances given in that section and in the corresponding sect. 3 of the Companies Act,

**XXIV. Reduction of Capital—Continued.**

1877, are not exhaustive, and do not limit the generality of the section.

IN RE LOUISIANA AND SOUTHERN STATES  
[REAL ESTATE AND MORTGAGE CO., [1909]  
2 Ch. 552; 101 L. T. 495—Neville, J.]

**(c) Power to Reduce.**

[No paragraphs in this vol. of the Digest.]

**(d) Return to Shareholders of Capital not required.**

[No paragraphs in this vol. of the Digest.]

**XXV. REGISTER OF MEMBERS.**

**26. Address Book of Shareholders—Shareholder's Application for Copy—Mandamus on Refusal—Motives of Applicant—Materiality—Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 10.]**—The right conferred upon a shareholder of a statutory company by its special Act (incorporating for this purpose the Companies Clauses Act, 1845) to have supplied to him a copy of the shareholders' address book is a private right incidental to his property, and is a right for the enforcement of which an action for *mandamus* under sect. 25 (8) of the Judicature Act, 1873, and Ord. 53 lies; and in such an action the Court is not bound by the rules which govern the Court of King's Bench in an application for the prerogative writ of *mandamus*, and it has no option to refuse to grant a *mandamus* or mandatory injunction on the ground that the motives of the plaintiff in asking for it are improper; and consequently any evidence as to the motives of the plaintiff is in such an action irrelevant and inadmissible.

Decision of Warrington, J. ([1909] 1 Ch. 248; 78 L. J. Ch. 160; 99 L. T. 827; 25 T. L. R. 135; 16 Manson, 56) affirmed.

DAVIES v. GAS LIGHT AND COKE CO., [1909]  
[1 Ch. 708; 78 L. J. Ch. 445; 100 L. T. 553;  
25 T. L. R. 428; 53 Sol. Jo. 399; 16 Manson,  
147—C. A.]

**XXVI. REGISTERED NAME.**

[No paragraphs in this vol. of the Digest.]

**XXVII. SALE OF UNDERTAKING.**

**27. Sale of Business to Foreign Company—Definition of Company—Ultra vires—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 192, 285.]**—A company cannot sell or transfer its business or property under sect. 192 of the Companies (Consolidation) Act, 1908, to a foreign company.

THOMAS v. UNITED BUTTER COMPANIES OF  
[FRANCE, LD., [1909] 2 Ch. 484; 101 L. T.  
388; 25 T. L. R. 824; 53 Sol. Jo. 733—Eve, J.]

**28. Sale of Undertaking to Another Company—Winding-up—Purchase of Dissident Member's Interest—Right of such Member to Examine Officers prior to the Arbitration as to Value—Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 115, 161, 162.]**—A company being in voluntary liquidation and its undertaking being about to be sold to another company under sect. 161 of the Companies Act, 1862, the liquidator elected

to purchase a dissident shareholder's interest under sect. 115 at a price to be fixed by arbitration.

The Court refused to allow the shareholder to examine the officers of the company under sect. 115 in order that he might obtain evidence for use on the arbitration.

*Morgan's Case* ((1884), 28 Ch. D. 620; 54 L. J. Ch. 765; 51 L. T. 623; 33 W. R. 209—Bacon, V.-C.) applied.

IN RE BRITISH BUILDING STONE CO., LD.,  
[1908] 2 Ch. 450; 77 L. J. Ch. 752; 99 L. T.  
608; 15 Manson, 349—Eady, J.]

**29. Transfer of Business to another Company—Sanction of Court—Form of Order.]**—An agreement and scheme of arrangement for a transfer of the business of the transferring company to the National Standard Life Assurance Corporation was sanctioned by the Court. The form of the order, taken from an order made by Parker, J., in a similar case (unreported), was, "Sanction the transfer of the business owned by the New Era Assurance Corporation (Limited) to the National Standard Assurance Corporation (Limited) on the terms proposed, and sanction the scheme of arrangement so as to make it binding upon the members and contributories of the transferred company and the liquidator, but without prejudice to the rights of the creditors of the transferred company."

IN RE NEW ERA ASSURANCE CORPORATION, LD.,  
[53 Sol. Jo. 743—Hamilton, J.]

**XXVIII. SECRETARY.**

[No paragraphs in this vol. of the Digest.]

**XXIX. SHAREHOLDERS.**

See XXX., and No. 54, *infra*.

**XXX. SHARES.****(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Allotment.**

**30. Minimum Subscription for Allotment—"Prospectus"—Two Prospectuses Issued—Omission from one Prospectus of Statement as to Minimum Subscription—Cancellation of Allotment—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 4, 5, 9, 10.]**—Sect. 4 of the Companies Act, 1900, applies to every prospectus offering shares to the public on the basis of which an applicant has actually subscribed for shares. Therefore, where a company issued a prospectus in the English language which stated the minimum subscription upon which the company might proceed to allotment, and another prospectus in the French language which did not in terms state such minimum subscription, a person who applied for shares on the basis of the latter prospectus was held entitled to have the allotment to him of shares cancelled and his application money repaid.

ROUSSELL v. BURNHAM, [1909] 1 Ch. 127; 78  
[L. J. Ch. 94; 100 L. T. 39; 25 T. L. R. 61;  
16 Manson, 30—Parker, J.]



## XXX. Shares.—(Continued).

**31. Minimum Subscription**—“Paid to and Received by the Company”—*Cheques Received, but held over*—Paid on Presentment—Irregular Allotment—Notice by Applicant Avoiding—Sufficiency of Notice—Time for Giving—Companies Act, 1900 (63 & 64 Vict. c. 48), ss. 4, 5.]—Cheques received on the day of allotment from applicants for shares, but held over until a later date, do not (although duly honoured on presentment) represent money “paid to and received” by the company before allotment within the meaning of sect. 4 of the Companies Act, 1900.

*Mears v. Western Canada Pulp and Paper Co.* ([1905] 2 Ch. 353; 74 L. J. Ch. 353; 93 L. T. 150; 21 T. L. R. 599, 661; 12 Manson, 295—C. A.) applied.

*Glasgow Pavilion, Ltd. v. Motherwell* (1903) 6 F. 116—Ct. of Sess.) distinguished.

If an applicant desires under sect. 5 to avoid an allotment made in contravention of sect. 4, it is sufficient for him to give notice of avoidance within the time prescribed, *i.e.* one month after the statutory meeting; actual legal proceedings need not necessarily be commenced within the month.

*Seemle*, this notice need not state the ground for avoiding the allotment.

IN RE NATIONAL MOTOR MAIL COACH CO.

[*LD.* ANSTIS & McLEAN'S CLAIMS, [1908]

2 Ch. 228; 77 L. J. Ch. 796; 99 L. T. 334; 15 Manson, 373—Eady, J.]

## (c) Calls.

**32. Application for Injunction to Restrain.**—The Court will not restrain a company from making calls on its shares and enforcing them, even in a case where the shareholder has launched an action to try the question as to his liability, for in such action he can, by resisting payment, get the question of liability settled, and so obtain a remedy without having recourse to an injunction.

*TATHAM v. PALACE RESTAURANTS, LD.*, 53 [Sol. Jo. 743—Hamilton, J.]

**33. Calls “From Time to Time”**—Two Calls of 2s. 6d. each Resolved on at Same Meeting—Separate, or One Call for 5s.]—The articles of association of a company provided that the directors might “from time to time” make such calls as they thought fit, provided that no call should exceed 2s. 6d. per share, and that a call should be deemed to have been made when the resolution of the board of directors authorising such call was passed. At a meeting of directors consecutive resolutions were passed and minuted, “That a call of 2s. 6d. per share . . . be made, payable on the 1st January, 1908 . . .” and “that a final call of 2s. 6d. per share . . . be made, payable on the 31st March . . .”

HELD—that the calls were separate and valid. *UNIVERSAL CORPORATION, LD. v. HUGHES*. [[1909] S. C. 1434; 46 Sc. L. R. 839—Ct. of Sess.]

## (d) Certificate.

[No paragraphs in this vol. of the Digest.]

## (e) Forfeiture.

[No paragraphs in this vol. of the Digest.]

## (f) Issued at a Discount.

See No. 4, *supra*.

## (g) Issued not for Cash.

[No paragraphs in this vol. of the Digest.]

## (h) Transfer.

See also No. 2, *supra*; STOCK EXCHANGE, Nos. 2, 3, 4.

**34. Transfer of Shares with Certificate**—Subsequent Transfer by Forged Certificate—Previous Transfer not then Executed—Representation on Certificate.]—The articles of association of a company provided that “any member may transfer . . . his shares, but any transfer must be left at the office of the company, accompanied by the certificate of the shares to be transferred and such other evidence (if any) as the directors may require to prove the title of the intending transferor.” Transfers of the company's shares did not necessarily have to be by deed. A certificate issued by the company to a shareholder had the following note at the foot:—“Note.—No transfer of the above shares will be registered without production of this certificate.” The shareholder transferred his shares for value to the plaintiffs, handing them the certificate with a transfer in which the name of the transferee was left blank. Subsequently the shareholder, by the production of a forged certificate for the shares, transferred them for value to R. and V., and that transfer was registered by the company. Subsequently the plaintiffs filed in their transfer and presented it for registration which was refused. In an action against the company claiming (1) a declaration that the plaintiffs were entitled to be placed on the register; (2) rectification of the register; and (3), alternatively, damages:—

HELD—that when the transfer to R. and V. was put upon the register, those two persons had a completely-executed transfer, whereas the plaintiffs had at that time no more than an unexecuted authority, and therefore that the plaintiffs could not rely on a right of property to claim rectification of the register; that the note appended to the certificate was a mere statement of fact as to the company's practice, and was not a contract that they would not register a transfer without production of the certificate; and therefore that the action failed.

*GUY AND OTHERS v. WATERLOW BROTHERS* [AND LAYTON, 25 T. L. R. 515—Channell, J.]

**35. Refusal to Register Transfer**—Proposed Transferee already on the Register.]—Under articles of association providing that “the directors of the company may decline to register any transfer of shares unless the transferee is approved by the board” the directors have an absolute right of approval or disapproval of the transferee, whether they have, or have not, approved of the same transferee on a former transfer or not.

## XXX. Shares—Continued.

The Court cannot interfere to compel an approval if the disapproval is *bonâ fide*.

IN RE DUBLIN NORTH CITY MILLING CO., LD.,  
[1909] 1 I. R. 179; 43 I. L. T. 121—Meredith, M.R., Ireland.

## (i) Underwriting Agreements.

36. *Company—Reconstruction—Shares partly Paid Up—Underwriting—Commission—Validity of Agreement—Ultra vires—Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 89.]—A company was formed to acquire the assets and undertake the liabilities of an old company under a scheme for the reconstruction of the latter. The old company agreed to sell its assets to the new company for the issue of certain shares of 5s. each, upon which 3s. 6d. was to be deemed to be paid up. The new company entered into an agreement with "contractors" whereby the latter undertook that if and so far as the shareholders of the old company would not take up the shares of the new company and the liquidator was unable to sell them, the contractors themselves would become responsible for the amount of the capital unpaid, and the contractors agreed to give a sum not exceeding a halfpenny a share to the liquidator, and then to apply to the new company to have those shares allotted to them. The commission to be paid to the contractors by the new company was 10 per cent. The articles of the company authorised the payment of underwriting commission, provided it did not exceed 25 per cent.

HELD—that the agreement was in effect an agreement for underwriting within sect. 89 of the Companies (Consolidation) Act, 1908, and was perfectly legitimate.

BARROW v. PARINGA MINES (1909), LD., [1909]  
[2 Ch. 658; 78 L. J. Ch. 723; 101 L. T. 346—Neville, J.]

## XXXI. UNREGISTERED COMPANIES.

37. *Commission on Issue of Shares—Offer of Shares to the Public—Payment in Shares or out of Capital Money—Companies Act, 1900* (63 & 64 Vict. c. 48), ss. 8, 30.]—"An offer of shares to the public for subscription" means an offer contained in some form of advertisement or intimation to the public generally—through an issue by the company of something which would come within the definition of a "prospectus" as defined in sect. 30 of the Companies Act, 1900.

The P. P. T. Company was incorporated in 1905, and by its memorandum of association one of the objects of the company was "to remunerate any parties for services rendered in placing or assisting to place shares in the company's capital"; and by art. 9 of its articles of association it was provided that "if the company shall at any time offer any of its shares to the public for subscription, the company may pay a commission not exceeding 100 per cent. in consideration of any person or company subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure

subscriptions absolute or conditional for such shares."

In the middle of the year 1908, the company being desirous to obtain further capital, S., a shareholder, introduced C. as one who might obtain purchasers of shares or take up unissued shares at a premium; and on November 13th, 1908, two documents were entered into between the company and C., one being an option given to C. in reference to unissued shares, the other being in reference to commission. Subsequently C. obtained D., who was willing to take up 3,000 unissued shares at £2 per share, and thereupon, in accordance with the terms of the second document of November 13th, there became payable to C. for commission 10s. per share, i.e., £1,500, and it was arranged that, instead of paying C. £1,500 in cash, the company should issue to C. 1,000 of the remaining unissued shares.

HELD—that, upon the true construction of sect. 8 of the Companies Act, 1900, there had been no offer of shares to the public for subscription, and therefore no commission was payable, and that the shares could not be issued to C. by way of remuneration as that would be an application of shares or capital money forbidden by the section.

Dictum of Lord Davey in *Hilder v. Dexter* ([1902] A. C. 474—H. L.) followed.

SHORTO v. COLWILL AND ANOTHER, [1909]  
[W. N. 218; 101 L. T. 598; 26 T. L. R. 55—Warrington, J.]

38. *Jurisdiction to Wind up Foreign Unregistered Company—Not more than Seven Members—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 199—*Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), ss. 267, 268.]—Under the Companies Act, 1862, the Court has no jurisdiction to wind up a foreign unregistered company not consisting of more than seven members.

*Bowling's Contract* ([1895] 1 Ch. 663) followed.

*Quare, secus* under the Companies (Consolidation) Act, 1908.

NEW YORK AND CONTINENTAL LINE, 54 Sol. Jo.  
[117—Eady, J.]

## XXXII. VOTING.

[No paragraphs in this vol. of the Digest.]

## XXXIII. WINDING-UP.

## (a) General.

*See also* Nos. 1, 8, 38.

39. *Solicitor's Lien—Retainer by Company in an Action—Retainer by Liquidator—Solicitor Discharged by Liquidator During the Course of the Action.*—A limited company brought an action against three of its directors, and obtained an interim injunction. A winding-up order was subsequently made against the company, and a liquidator was appointed. A solicitor was retained in the action by the company, and after the winding-up by the liquidator, who discharged him before the trial. The liquidator

**XXXIII. Winding-up—Continued.**

applied to make the solicitor, subject to his lien, deliver up papers for the purposes of the action.

**HELD**—that the solicitor must hand over any documents which had come into his possession since, but not those prior to, the winding-up order.

**IN RE RAPID ROAD TRANSIT CO.**, [1909] 1 Ch. 196; 78 L. J. Ch. 132; 99 L. T. 774; 53 Sol. Jo. 83—Neville, J.

**40. Stay of Execution—Projected Arrangement with Creditors—Order for Meetings of Creditors and Members—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120.**—The Court has no power to grant a stay of execution on a judgment recovered against a company, although an order has been made under sect. 120 of the Companies (Consolidation) Act, 1908, for meetings of creditors and members, before any scheme of arrangement has been approved at those meetings and sanctioned by the Court.

**BOOTH v. WALKDEN SPINNING AND MANUFACTURING CO., LD.**, [1909] 2 K. B. 368; 78 L. J. K. B. 764; 16 Manson, 225—Div. Ct.

**(b) Assets.**

**41. Surplus Assets—Preference Shareholders Entitled to Arrears of Dividend—No Dividends Declared—Dividends Payable only out of Profits.**—By the articles of association of a company, whose capital was divided into 5 per cent. cumulative preference shares and ordinary shares, it was provided that in the event of winding-up the surplus assets should be applied, first, in repaying the paid-up preference capital, and secondly, in paying arrears, if any, of the preferential dividend, and that the remainder should be distributed among the ordinary shareholders proportionately to the amount of capital paid up. Dividends were payable only out of profits. No dividends were ever declared, but at the winding-up the accumulated profits amounted to £605, while arrears of dividend on the preference shares, if calculated at 5 per cent., would have amounted to £1,457. After payment of debts and repayment of the preference capital, £1,617 remained. The question was whether the preference shareholders were entitled to £1,457, £605, or nothing.

**HELD**—that the preference shareholders were entitled to arrears of dividends, whether declared or not, but only to the extent of £605, the amount of profits.

**IN RE W. J. HALL & Co.**, [1909] 1 Ch. 521; [78 L. J. Ch. 382; 100 L. T. 692; 16 Manson, 152—Eady, J.

**42. Parliamentary Company—Preference Shareholders—Priority—Arrears of Cumulative Preferential Dividend—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 120.**—A tramway company registered in 1885 under the Companies Acts was dissolved and reincorporated by special Act in 1887. Preference shares in the new company were given in exchange to the old preference shareholders

whose rights were preserved. The old company's memorandum and articles of association did not define these rights, but the directors were empowered to give such preferential rights as they thought proper on issuing preference shares. They were entitled to a cumulative preference dividend, but not to priority as to capital. The company's special Act incorporated the Companies Clauses Consolidation Act, 1845, and Part I., but not Part II., of the Companies Clauses Act, 1863, but provided that any new shares should be issued subject to Part II. of the later Act, thereby making the new preference shares which were issued non-cumulative. In 1907 the company's undertaking was taken over by a public authority, and in 1908 the company was wound up under sect. 199 of the Companies Act, 1862. Arrears of dividends on the preference shares for the years between 1890 and 1894 amounted to 13 per cent. The assets when realised were not sufficient to repay the capital in full.

**HELD**—that the old preference shareholders were not entitled to the arrears of their cumulative preference dividend, as such dividends had not been declared under sect. 120 of the Companies Clauses Consolidation Act, 1845; that in the absence of any special provision preference shareholders in a parliamentary company have no priority over ordinary shareholders as to repayment of capital; and that the assets must be distributed rateably among all the shareholders in proportion to their capital.

**IN RE ACCRINGTON CORPORATION STEAM TRAMWAYS CO.**, [1909] 2 Ch. 40; 78 L. J. Ch. 485; 101 L. T. 99; 16 Manson, 178—Eady, J.

**(c) Compulsory Order.**

**43. Appeal by Company—Security for Costs—Practice.**—A company served notice of appeal against a compulsory winding-up order on the Official Receiver and liquidator, who now moved that security for costs should be given by some sufficient person.

**HELD**—that, inasmuch as the costs of the appeal, if unsuccessful, would have to be paid by the successful respondent, the company, although they had a right to appeal, ought only to be allowed to do so on finding security indemnifying the costs of the appeal, not from the company's funds, but from the persons who really promoted the appeal.

**IN RE CONSOLIDATED SOUTH RAND MINES** [DEEP, LD., [1909] W. N. 66—C. A.

**44. Petition by Creditor—Debt under £50—No Assets Except Uncalled Capital—Company Refusing to make Calls.**—A company which had never carried on any business and whose only assets consisted in uncalled capital to the amount of £950 became indebted to the petitioner to the extent of £28 11s. 4d., who had obtained judgment for that sum with £7 costs. The company refused to make calls to pay the petitioner's debt.

**HELD**—that, although the petitioner's debt



### XXXIII. Winding-up—Continued.

was under £50, the usual order with costs for a compulsory winding-up ought to be made.

IN RE WORLD INDUSTRIAL BANK, LD., [1909]  
[W. N. 148—Neville, J.]

45. *Substratum of Company Gone—Petition of Minority of Shareholders—Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 26.]—Where on the construction of a company's memorandum of association it appears that the main object for which it was formed, namely, the purchase of restaurants as a going concern, has not been accomplished and the opportunity of purchase is lost, the substratum of the company has gone and a compulsory winding-up order should be made on the petition of a substantial minority of shareholders.

IN RE PALACE RESTAURANTS, LD., 127 L. T. Jo.  
[430—Hamilton, J.]

46. *Petition of Small Shareholder—Alleged Past Misconduct of Director—Prosperous Company.*—A prosperous company should not be ordered to be compulsorily wound up at the instance of a holder of a small minority of shares alleging past misconduct of a director when, if the petitioner's allegation be true, there is an adequate remedy open to him in an action at law.

IN RE SHEPHERD'S BUSH IMPROVEMENTS, LD.,  
[Times, March 9th, 1909—C. A.]

#### (d) Contributories.

47. *List of Contributories—Colourable Transfer of Shares—Equitable Rights of Transferee to Avoid Transfer—Rights of Liquidator.*—A contract between a transferor and the transferee of shares which has been induced by misrepresentation to the transferee is not void but voidable. In the absence of evidence of collusion between transferor and transferee, or of misrepresentation to the company's directors who have accepted the transfer for registration, although the transferee has an equitable right to have the contract set aside, the liquidator in the winding-up of the company is not entitled to take advantage of that right so as to be entitled to have the name of the transferor substituted for that of the transferee in the list of contributories.

IN RE DISCOVERERS FINANCE CORPORATION,  
[LD. (No. 2), LINDLAR'S CASE, [1909] W. N. 245; 101 L. T. 672; 26 T. L. R. 98—Neville, J.]

#### (e) Creditors.

[No paragraphs in this vol. of the Digest.]

#### (f) Examination.

No paragraphs in this vol. of the Digest.]

#### (g) Fraudulent Preference.

No paragraphs in this vol. of the Digest.]

#### (h) Liquidators.

See INDUSTRIAL SOCIETIES, No. 3.

#### (i) Petition.

48. 'Creditor'—Holders of Debenture Stock—Debentures Secured by Trust Deed—No Covenant

Between Company and Stock-holders—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82.]—Where debenture stock is secured by a trust deed made between the company and trustees, and each stock-holder has issued to him a certificate merely certifying that he is a registered holder of stock subject to the provisions of the trust deed, there is no covenant between the company and the stock-holders; and provisions in the trust deed for the payment of interest direct to the stock-holders, whose receipts should be a discharge for the same, do not make the stock-holders creditors of the company for the purposes of a winding-up petition on the company's failure to pay the debenture interest.

IN RE DUNDERLAND IRON ORE CO., LD., [1909]  
[1 Ch. 446; 78 L. J. Ch. 237; 100 L. T. 224;  
16 Manson, 67—Eady, J.]

49. *Judgment Creditor—Mortgage of Interest—Absence of Assets—Companies Act, 1907* (7 Edw. 7, c. 50), s. 29.]—A petition for winding-up, presented by a judgment creditor, was opposed by the company on the ground that the petitioner had mortgaged his interest in the judgment debt. It was also objected that the company had no realisable assets.

HELD—that the first objection could be obviated by joining the mortgagee as petitioner, and, as to the second, that the absence of assets afforded, by reason of sect. 29 of the Companies Act, 1907, no ground for refusing an order for compulsory winding-up.

IN RE BARTITSU LIGHT CURE INSTITUTE, LD.,  
[Times, January 13th, 1909—Eady, J.]

50. *Notice of Intention to Appear in Opposition—Addresses—Winding-up Rules, 1903, r. 33, Form 11.*—Notices on Form 11, under r. 33 of the Winding-up Rules, 1903, of intention to appear and oppose a winding-up petition must give the addresses as well as the names of those intending to appear.

IN RE DESCOURS, PARRY & CO., LD., [1909] W. N.  
[50—Eady, J.]

51. *Creditors out of Jurisdiction Presenting Petition—Security for Costs.*—A foreign company presented a petition for the compulsory winding-up of an English company which was in voluntary liquidation and the whole of whose assets had been taken possession of by debenture-holders.

HELD—that although the debt to the petitioners was admitted, they must give security for costs.

*In re Contract and Agency Corporation* ((1887) W. N. 218; 4 T. L. R. 141—Stirling, J.) distinguished.

IN RE ALABAMA PORTLAND CEMENT CO., LD.,  
[1909] W. N. 157; 25 T. L. R. 691—  
Neville, J.]

#### (k) Practice.

[No paragraphs in this vol. of the Digest.]

#### (l) Proof.

[No paragraphs in this vol. of the Digest.]

## XXXIII. Winding-up.—Continued.

## (m) Reconstruction.

[No paragraphs in this vol. of the Digest.]

## (n) Surplus Assets.

[No paragraphs in this vol. of the Digest.]

## XXXIV. VOLUNTARY WINDING-UP.

## (a) General.

52. *Question Arising in Winding-up—Application to Court—Companies Act, 1862* (25 & 26 Vict. c. 89), s. 138—*Companies Act, 1900* (63 & 64 Vict. c. 48), s. 25—*Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 193.]—A managing director of a company in voluntary liquidation presented a petition under the Companies Acts, 1862, s. 139, and 1900, s. 25, in which he asked the Court to determine authoritatively, whether a claim by a managing director for arrears of salary was a good claim against the company in liquidation to any, and if so to what, extent.

HELD—that the claim against the company, being a claim for damages, did not form an appropriate question to be decided in an application under the section, and that its determination did not fall within the description “just and beneficial” required by the statute.

CRAWFORD v. McCULLOCH, [1909] S. C. 1063;  
[46 Sc. L. R. 749—Ct. of Sess.]

## (b) Liquidators.

53. *Liquidator having Intimate Business Connection with Directors—Removal of Liquidator—Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 186 (9).]—Having regard to the authority with which the liquidator of a company is invested, he must be a person who will act independently, especially of those against whom there may be pending claims, and will discharge his duties without favour to either side.

Where it appeared that the liquidator in the voluntary winding-up of a company had an intimate business connection with several of the directors of the company, who were also directors of other companies between which and the company in question there had been dealings requiring investigation, the Court, being of opinion that he was not in a position to take an independent course in making the necessary investigations, made an order removing him from the office of liquidator, and appointed another liquidator in his place.

IN RE CHARTERLAND GOLDFIELDS, LD., 26  
[T. L. R. 132—Eady, J.]

## (c) Reconstruction.

[No paragraphs in this vol. of the Digest.]

## (d) Supervision Orders.

[No paragraphs in this vol. of the Digest.]

## (e) Surplus Assets.

54. *Preference and Ordinary Shareholders—Priority—Construction of Memorandum and Articles—Surplus after Repayment of Capital—Arrears of Dividends—Distribution according to Nominal Amount of Shares.*—By a company's

memorandum of association the preference shares of £5 each were entitled to a cumulative preferential dividend of 10 per cent. and to priority over the ordinary shares, also of £5, in repayment of capital with interest on the winding up of the company. In the articles of association this priority in repayment of capital was repeated, but without the reference to interest, and it was provided that the preferential dividend should be paid out of the divisible profits in each year. Only one dividend of 3 per cent. on the preference shares had been paid. The ordinary shares had been written down to 1s. each. The company having sold all its assets and being voluntarily wound up, a surplus remained, after meeting all liabilities, sufficient to leave a substantial balance after repayment of both preference and ordinary capital. Out of this surplus the preference shareholders now claimed to be paid dividends of 10 per cent. since the formation of the company. The ordinary shareholders contended that the whole balance after repayment of preference capital with interest since the date of winding-up belonged to them.

HELD—that the preference shareholders were not entitled to arrears of dividends, as these were payable only out of profits, but that the balance, after repayment of both classes of capital with interest on the preference capital since the date of winding-up, must be divided among both preference and ordinary shareholders according to the nominal amount of their shares, viz., £5 and 1s. respectively.

IN RE ESPUELA LAND AND CATTLE CO., [1909]  
[2 Ch. 187; 78 L. J. Ch. 729; 101 L. T. 13;  
16 Manson, 251—Eady, J.]

## COMPOSITION WITH CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

## COMPOUNDING FELONY.

See CRIMINAL LAW.

## COMPULSORY PURCHASE AND COMPENSATION.

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**I. RIGHT TO TAKE LAND.****(a) In General.**

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**(b) Superfluous Land.**

[No paragraphs in this vol. of the Digest.]

**II. COMPENSATION.****(a) Principle of Assessment.**

See also Nos. 10, 11, *infra*.

**1. Copyholds — Enfranchisement — Quittances — Interest — Assessment of Compensation — Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 95, 96, 97.]**—Certain copyholds having been conveyed to the corporation of T., negotiations followed for their enfranchisement under sects. 96 and 97 of the Lands Clauses Consolidation Act of 1845. The amount of compensation being referred to an arbitrator, the lord claimed, *inter alia*, compensation for loss of quittances, which were customary charges of 4*d.* for every receipt demanded by a copyholder for any payment made by him.

**HELD**—that the quittances came within sect. 96 of the Act so as to be a matter for compensation.

**HELD ALSO**—that interest at 4 per cent. on the compensation money, calculated from the date of the obligation to enfranchise, was payable by the corporation after deducting any rents paid to the lord by the corporation.

**IN RE DUKE OF NORTHUMBERLAND AND [MAYOR, ETC., OF TYNEMOUTH, [1909] 2 K. B. 374; 78 L. J. K. B. 767; 100 L. T. 930; 73 J. P. 326—Phillimore, J.]**

**(b) Injurious Affection.**

[No paragraphs in this vol. of the Digest.]

**III. PROCEDURE.****(a) Generally.**

[No paragraphs in this vol. of the Digest.]

**(b) Notice to Treat.**

**2. Repudiation as to Part — Withdrawal — Revival of Previous Notice.]**—A notice to treat under Michael Angelo Taylor's Act operates as a contract so as to fix the subject-matter of the notice, and the person upon whom it is served must either accept it as a whole or repudiate it altogether. If he repudiates it those serving the notice can withdraw it.

Decision of Eve, J. ([1909] 2 Ch. 287; 78 L. J. Ch. 633; 100 L. T. 925; 73 J. P. 364; 25 T. L. R. 622; 53 Sol. Jo. 561; 7 L. G. R. 733) affirmed.

**WILD v. WOOLWICH BOROUGH COUNCIL, [1909] [W. N. 217; 101 L. T. 58; 26 T. L. R. 67; 54 Sol. Jo. 64—C. A.]**

**(c) Costs.**

**3. Costs of Conveyance — Death of Vendor before Completion — Vendor's Will — Probate — Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 82.]**—B. had contracted under the Lands Clauses Act, 1845, to sell certain leasehold property to the London County Council. Before completion he died, having by his will given all his property to his wife and appointed her sole executrix. She proved the will and completed the assignment of the leaseholds.

**HELD**—that the costs of obtaining probate of the vendor's will did not come within those which the council were liable to pay under sect. 82 of the Lands Clauses Act, 1845.

Decision of Joyce, J. ([1908] 2 Ch. 503; 72 J. P. 445; 99 L. T. 467; 24 T. L. R. 808; 52 Sol. Jo. 681) affirmed.

**IN RE ELEMENTARY EDUCATION ACTS, 1870 [AND 1873, EX PARTE BAXTER, [1909] 1 Ch. 55; 78 L. J. Ch. 281; 99 L. T. 862; 73 J. P. 22; 25 T. L. R. 78—C. A.]**

**(d) Taking Part Only.**

[No paragraphs in this vol. of the Digest.]

**IV. PURCHASE-MONEY IN COURT.**

**4. Practice—Petition for Payment Out—Costs — Inclusion of another Fund in Petition — Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.]**—This was a petition for payment out of two funds in Court, one representing moneys paid into Court on the compulsory purchase of land comprised in certain deeds by a railway company under the Lands Clauses Consolidation Act, 1845, the other representing proceeds of enfranchisement of copyholds held of a manor comprised in the same deeds. The petition also asked that the costs of the petitioner and of all other necessary parties, of and consequent on the petition might be taxed, and that the railway company's successors in title might be ordered to pay all the costs when taxed, except the amount by which the costs should be certified to have been increased by reason of the inclusion in the petition of the fund representing the proceeds of enfranchisement of copyholds.

**HELD**—that there was no difference between this case and one of an application for reinvest-



#### IV. Purchase-money in Court—Continued.

ment in land, and that the order asked for as to costs was the proper one.

IN RE LYNN AND FAKENHAM RAILWAY  
[(EXTENSION) ACT, 1880, [1909] W. N. 24;  
100 L. T. 432; 73 J. P. 163—Parker, J.]

5. *Summons for Payment Out and for other Matters—Order as to One Point—Failure of Rest of Summons—Costs—What Costs included—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), ss. 76, 80.*—A fund of money, representing the purchase-money of houses which had been taken compulsorily, was in Court, and the plaintiffs on an originating summons asked for inquiries as to children, a declaration on the construction of a will, payment out of the fund in accordance with the result of the inquiries and declaration, and an order for payment of the costs by the promoters of the undertaking. The summons failed, except that an order was made that a sum representing interest should be paid to the plaintiffs, and that the promoters should pay to the plaintiffs "their costs (including therein all reasonable charges and expenses incident thereto) of obtaining this order and of all proceedings relating thereto."

HELD—that the costs payable by the promoters did not include all the costs incurred in connection with the parts of the summons which had failed, but must be confined to the costs of obtaining the order as actually made.

IN RE JACOBS, BALDWIN v. PESCOTT, [1908]  
[2 Ch. 691; 78 L. J. Ch. 24; 99 L. T. 726—  
Warrington, J.]

6. *Charity Land—Payment Out to Official Trustees—Costs of Obtaining New Scheme—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.*—A county council compulsorily purchased land belonging to a charity, and the trustees, without power of sale, of the charity consequently applied to the Charity Commissioners for a new scheme for the administration of the charity. On a petition for payment out of the purchase-money in Court to the official trustees of charitable funds, the trustees asked that the county council should be ordered to pay the costs incurred by them in obtaining the new scheme.

HELD—that the costs of obtaining the new scheme fell under sect. 80 of the Lands Clauses Consolidation Act, 1845, both as costs "incurred in consequence of the purchase" and as costs of an order of payment out of Court, or of "proceedings relating thereto."

IN RE WOOD GREEN GOSPEL HALL CHARITY,  
[EX PARTE MIDDLESEX COUNTY COUNCIL,  
[1909] 1 Ch. 263; 78 L. J. Ch. 193; 100 L. T.  
194—Warrington, J.]

7. *Payment Out—Person Absolutely Entitled—Adverse Possession—Right to Value of Reversion after Expiration of Term—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 79.*—A person showing title by adverse possession for twelve years after the expiration of a long term of years to land taken under the Lands

Clauses Act will, in the absence of any valid claim by the reversioner, be deemed to be the owner of the land and entitled to payment out of the purchase-money under sect. 79.

Er parte Chamberlain ((1880) 14 Ch. D. 323; 49 L. J. Ch. 354; 42 L. T. 358; 28 W. R. 565—Bacon, V.-C.) followed.

IN RE HARRIS, HANSLER v. HARRIS, 1909  
[W. N. 181; sub nom. IN RE HARRIS, EX  
PARTE LONDON COUNTY COUNCIL, 53  
Sol. Jo. 716—Eve, J.]

8. *Payment Out—Persons "Absolutely Entitled"—Borough Council—Consent of Local Government Board—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 69—London Government Act, 1899 (62 & 63 Vict. c. 14), s. 6, sub-s. 5.*—A petition was presented by a borough council asking for payment out of Court to their treasurer of a sum of £2,580, the petitioners claiming that they were persons "absolutely entitled" thereto within the meaning of sect. 69 of the Lands Clauses Consolidation Act, 1845. By sect. 6, sub-sect. 5, of the London Government Act, 1899, "a borough council may, with the consent of the Local Government Board, alienate any land for the time being vested in the council, and the proceeds of the sale of any land sold by the council shall be applied in such manner as the Local Government Board sanction." The consent of the Local Government Board had not been obtained.

HELD—that payment out ought to be refused, for, although Warrington, J., had allowed it in the case of *Ex parte Mayor, &c., of Woolwich* ([1908] W. N. 56), there might possibly have been some fact not stated in the note of that case which justified the decision there; but that as it stood it was a decision which ought not to be followed.

Decision of Eady, J., affirmed.

EX PARTE GREAT WESTERN RY. CO., IN RE  
[GREAT WESTERN RAILWAY (NEW RAIL-  
WAYS) ACT, 1905. [1909] W. N. 202—C. A.]

#### V. PARTICULAR CLASSES OF UNDERTAKINGS.

##### (a) Railways.

See also RAILWAYS, Nos. 1, 4.

9. *"Superfluous Lands"—Not wholly Used or Required—Land over Tunnels—Easement in Tunnel—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 127—Lancashire and Yorkshire Railway (New Works and Additional Powers) Act, 1872 (35 & 36 Vict. c. cxvi), s. 32—Lancashire and Yorkshire Railway Act, 1875 (38 & 39 Vict. c. cxxv.), s. 35.*—A railway company having power under its Act to acquire lands for its undertaking formed two tunnels. The conveyance dated in 1850 of the first tunnel granted to the company the fee simple in that tunnel, and it was constructed in land under lease for seventy-five years from 1845, surrendered in 1873, and again leased for seventy-five years, with a reservation of minerals, on September 11th, 1873. The second tunnel was constructed in land part of which was also

### V. Particular Classes of Undertaking—*Continued.*

comprised in the lease of 1873, the grant giving the company the right to construct and enjoy "a second tunnel or underground passage" for the railway.

By the company's Acts of 1872 and 1875 they were empowered to sell lands not wholly used or required for the company's purposes. The Lands Clauses Act was incorporated with the company's Acts.

In 1889 the company took an assignment of the residue of the term demised by the lease of September, 1873, and in the year 1908 contracted to sell their leasehold interest to the Earl of D.'s trustees except their interest in the two tunnels.

HELD—that *In re Metropolitan District Railway Co. and Cosh* ((1880). 13 Ch. D. 607; 49 L. J. Ch. 277; 42 L. T. 73; 44 J. P. 393; 28 W. R. 685), being an authoritative construction of the word "lands" generally applicable to all cases arising under sect. 127 of the Lands Clauses Act, 1845, applied in the present case, although the company's interest was a leasehold interest, and as to one tunnel the company had only an easement.

HELD FURTHER—that although the company's Acts contained enabling sections, and no prescribed period, the word "lands" used in them must be given a meaning similar to that in the Lands Clauses Act, and that upon these grounds the company could not make out their title to sell the land vertically over the tunnels.

IN RE LANCASHIRE AND YORKSHIRE RY. CO.  
[AND EARL OF DERBY'S CONTRACT. 100  
L. T. 44—Eve, J.]

#### (b) Waterworks.

10. *Special Adaptability of Land—Reservoir—User Impossible without Parliamentary Powers or Concurrence of Purchasers—Right of Arbitrator to take into Consideration.*—In an arbitration under the Lands Clauses Acts, the umpire found that certain land which was being compulsorily purchased by the board for the construction of a reservoir had peculiar natural advantages as a reservoir site in conjunction with other land belonging to another owner; but that the construction of a reservoir by the claimant and the owner of the other land would be interfered with by a line of pipes which had been previously constructed by the board, and could not be carried out without the board's consent.

HELD—that the special adaptability of the land for a reservoir site was a fit and proper matter for consideration in assessing the compensation to be paid by the board, although in the absence of the board's concurrence the site could only be used for a reservoir by obtaining parliamentary powers.

Decision of Bray, J. ([1908] 1 K. B. 571; 77 L. J. K. B. 374; 72 J. P. 76; 98 L. T. 37; 24 T. L. R. 229; 52 Sol. Jo. 173; 6 L. G. R. 150) affirmed.

IN RE LUCAS AND CHESTERFIELD GAS AND [WATER CO., [1909] 1 K. B. 16; 77 L. J. K. B. 1009; 99 L. T. 767; 72 J. P. 437; 24 T. L. R. 858; 6 L. G. R. 1106—C. A.]

### (c) Housing of the Working Classes Acts.

11. *Compensation—Easement—Loss of Trade—Diminution in Value of Goodwill—Housing of the Working Classes Act, 1890* (53 & 54 Vict. c. 70), ss. 20, 21, 22.]—In determining the compensation to be paid to a claimant for any loss sustained by reason of the provisions of the Housing of the Working Classes Act, 1890, owing to the partial extinguishment of or interference with an easement of light and air relating to the lands required for the purpose of carrying into effect the improvement scheme, the arbitrator cannot take into consideration the loss of trade or diminution in value of goodwill suffered by the claimant.

IN RE AN ARBITRATION BETWEEN HARVEY [AND THE LONDON COUNTY COUNCIL, [1909] 1 Ch. 528; 78 L. J. Ch. 285; 100 L. T. 293; 73 J. P. 124; 25 T. L. R. 221; 7 L. G. R. 247  
—Neville, J.]

#### (d) Education Authorities.

[No paragraphs in this vol. of the Digest.]

## CONCEALMENT OF BIRTH.

See CRIMINAL LAW AND PROCEDURE.

## CONDITIONS OF SALE.

See SALE OF GOODS; SALE OF LAND.

## CONFESSIONS.

See EVIDENCE.

## CONFLICT OF INTEREST AND DUTY.

See TRUSTS AND TRUSTEES.

## CONFLICT OF LAWS.

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See also ARBITRATION, No. 6; DEPENDENCIES, No. 13; JUDGMENT, No. 1.

#### (a) Miscellaneous.

1. *Agreement to Refer Disputes to Foreign Court—Staying Proceedings.*—An agreement to



**Miscellaneous—Continued.**

refer disputes to a foreign tribunal entitles a defendant to a stay of proceedings in this country, unless the plaintiff makes out a case for an injunction.

KIRCHNER & CO. v. GRUBAN, [1909] 1 Ch. 413; [78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151—Eve. J.

**2. Roman-Dutch Law—Wife Surety for her Husband—Mortgage of Land in Transvaal—Lex Situs.]**—The defendant's husband being indebted to the plaintiffs for advances, the defendant, by an agreement dated November 23rd, 1903, agreed to give to the plaintiffs as security two mortgage bonds to be charged upon certain real property in Johannesburg registered in her name. The plaintiffs subsequently made further advances to the defendant's husband. On December 4th, 1906, the defendant appointed the plaintiffs' manager to be her attorney to mortgage or transfer the property to the plaintiffs. In an action by the plaintiffs for specific performance of the agreement of November, 1903:

**HELD**—that the defendant's capacity to contract was governed by the *lex situs*; that by Roman-Dutch law the defendant, as a married woman, was incapacitated from entering into such a contract unless, after explicit explanation of the real nature of her rights, she formally renounced them, and that as the defendant had not formally renounced her rights the agreement of November, 1903, was void, and the plaintiffs' action, therefore, failed.

**HELD FURTHER**—that the agreement of November, 1903, and the document of December, 1906, must be delivered up to the defendant.

Decision of Eve. J. ([1909] W. N. 50; 100 L. T. 295; 25 T. L. R. 285; 53 Sol. Jo. 268) affirmed.

BANK OF AFRICA, LD. v. COHEN, [1909] 2 Ch. [129; 78 L. J. Ch. 767; 100 L. T. 916; 25 T. L. R. 625—C. A.]

**3. Dutch Law—Husband and Wife Community of Property—Division on Dissolution of Marriage.]**—The plaintiff, who was of English birth, was married to the defendant, a Dutchman, domiciled in Holland. In 1897 the marriage was dissolved by a decree of the Dutch Court. At the time of the marriage the defendant carried on a business of dealing in cardboard partly on commission and partly on his own account, which business he had continued to carry on after the dissolution of the marriage. According to Dutch law, which regulated the marriage, there was during the marriage absolute community of property between husband and wife, the husband having sole management, and on dissolution of the marriage either party was entitled to an equal division of the property. No division had been made or demanded in 1897 or since, till the present action.

**HELD**—that the plaintiff was entitled to a moiety of the excess of assets over liabilities of the business at the date of the dissolution of the marriage with interest at 4 per cent., and to a moiety of all the other common property at the

same date, of the proceeds of any sale thereof, and of the rents and dividends since accrued; but that she was not entitled to trace the business assets to specific property existing at the present time nor to half the profits since the dissolution of the marriage nor to half the value of the goodwill at the date of dissolution.

SWAAGMAN v. SWAAGMAN, Times, February 17th, [1908—Joyce, J.]

Affirmed, Times, March 19th, 1909—C. A.

**4. Contract made in Ireland—Agreement that it shall be Construed and Operate as an English Contract—Construction—Forum.]**—A contract entered into in Ireland between an Irish corporation and a company carrying on business and having its registered office in England contained a clause that the contract should "in all respects be construed and operate as an English contract and in conformity with English law." An action for damages for breach of the contract had been brought in the Irish Court against the English company, and an *ex parte* order obtained for leave to issue and serve the writ out of the jurisdiction.

**HELD**—that the writ issued in the Irish High Court and served on the defendants in England should be set aside, on the ground that the parties had agreed to treat the contract as if it had been made in England, and that it was to be construed in conformity with English, as distinguished from Irish law.

**HELD**, also, that the effect of such an agreement was not to deprive the Irish Court of all jurisdiction.

LIMERICK CORPORATION v. CROMPTON & Co. [LD., 43 L. T. 49—C. A., Ireland.]

**5. Contract—Construction—Arbitration Clause—Effect.]**—A contract made in Scotland between the appellant corporation and a firm of contractors carrying on business in Scotland, to erect electric power machinery at Johannesburg in South Africa, contained a clause to the effect that "This contract shall be deemed for all purposes an English contract enforceable in and subject to the jurisdiction of the English courts." It also contained an arbitration clause referring "any dispute or difference" between the parties "to the arbitration of a single arbiter . . . to be mutually agreed upon between the parties, or, failing agreement, to be nominated by the president for the time being of the Institute of Civil Engineers of London, or, in the case of disputes arising with local contractors, by the Lieutenant-Governor of the Transvaal. The decision of such arbiter . . . shall be final . . . and the arbitration shall be an arbitration within the meaning of the Arbitration Act, 1889 (England), and shall be conducted in all respects as therein provided, and this clause shall stand for the submission as agreed between the parties thereto in the event of such arbitration becoming necessary." Disputes arose, and the appellants brought an action against the contractors in Scotland.

**HELD**—that the arbitration clause must be construed according to the law of England, but, as the parties were not agreed as to the matter



**Miscellaneous—Continued.**

which should form the subject of the arbitration, the case must be referred back to the Court in Scotland to ascertain the matters really in dispute.

Decision of the Court of Session ([1909] Sc. 860; 46 Sc. L. R. 657) reversed.

JOHANNESBURG MUNICIPAL COUNCIL *v.* D. STEWART & Co., LD., 47 Sc. L. R. 21; [1909] W. N. 161—H. L. (Sc.)

**(b) Domicil.**

[No paragraphs in this vol. of the Digest.]

**(c) Foreign Judgments.**

**6. Action upon Foreign Judgment—French Court—Persons Domiciled in England—Final Judgment—Natural Justice.**—The plaintiff and defendants entered into an agreement whereby the latter obtained the exclusive right to sell the plaintiff's products in Great Britain and her colonies for a certain period. The agreement also provided for the payment of an indemnity in the event of a breach of contract on the part of the defendants, and that the French Tribunals of Commerce were alone to have jurisdiction. The plaintiff issued a writ, which was served in accordance with the French Code of Civil Procedure by leaving it at the office of the Procureur-Général. The writ was also sent to the French Consulate in London, and notice was given to the defendants. The plaintiff obtained judgment against the defendants before the Tribunal de Commerce de Lyon, service of which was effected by leaving it at the office of the Procureur-Général, and notice was given to the defendants through the French Consulate in London. The defendants ignored the notice of both writ and judgment. Subsequently notice of the execution of the judgment and a certificate of *nulla bona* were sent to the defendants. The plaintiffs now sued the defendants in England on the French judgment.

**HELD**—that the defendants were liable for the amount of the judgment, as there was nothing in the proceedings before the French Tribunal that was contrary to natural justice, although the defendants were informed of the commencement of the proceedings at a time that it was practically impossible for them to appear on the day named; also, that in France there was in existence a final judgment binding on the defendants at the time when the English action was brought.

JEANNOT *v.* FUERST, 100 L. T. 816; 25 T. L. R. [424; 53 Sol. Jo. 449—Bray, J.]

**(d) Marriage and Divorce.**

See also HUSBAND AND WIFE, Nos. 2, 3.

**7. Restraining Proceedings Abroad—Wife's Suit for Judicial Separation—Divorce Proceedings by Husband in Foreign Country—Injunction to Restrain.**—A defendant will not be restrained from commencing and prosecuting proceedings in a foreign country to enforce rights which he has there acquired against a plaintiff under the law of that foreign country. Consequently,

when a wife had commenced proceedings for judicial separation, the Court declined to restrain the husband, who had acquired a foreign domicil, from prosecuting divorce proceedings in the foreign country.

Decision of Bigham, Pres. (25 T. L. R. 410; 53 Sol. Jo. 377) reversed.

VARDOPULO *v.* VARDOPULO, 25 T. L. R. 518; 53 [Sol. Jo. 469—C. A.]

**(e) Marriage Settlements.**

See SETTLEMENTS, No. 6.

**(f) Wills and Intestacy.**

[No paragraphs in this vol. of the Digest.]

**CONJUGAL RIGHTS.**

See HUSBAND AND WIFE.

**CONSIDERATION.**

See CONTRACT.

**CONSPIRACY.**

See CRIMINAL LAW AND PROCEDURE;  
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**CONTAGIOUS DISEASES.**

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**CONTEMPT AND ATTACHMENT.**

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See also EVIDENCE, No. 8; WILLS, No. 59.

**(a) Contempt of Court.**

**1. Ward of Court Committed to Prison—Marriage without Leave of Court—Ignorance of Wife—Grounds for not Committing.**—In this case a male ward of Court was committed to prison for contempt of Court in marrying without leave of the Court.

**HELD ALSO**—that the wife's ignorance of the fact that her husband was a ward of Court did not render her act any less a contempt of Court, but that her ignorance of this fact, her age, and the absence of a sordid motive on her part might be taken into account as grounds for not resorting to the punishment of imprisonment for contempt in her case.

IN RE H.'S SETTLEMENT, H. *v.* H., [1909] [2 Ch. 260; 78 L. J. Ch. 745—Warrington, J.]

Contempt of Court—(Continued).

2. *Pending Action—Libel—Newspaper Paragraph—“Very Serious.”*—A newspaper published a paragraph as follows:—“We are requested by Messrs. B. & Co., solicitors to the N. Co., to state that they are taking proceedings against B. and the proprietors and printers of *John Bull*, in respect of a very serious libel that has appeared in this week’s issue of *John Bull*.”

HELD—that the publication of the words “very serious” was not a contempt of Court.

R. v. PARKE AND OTHERS, EX PARTE JOHN [BULL, LD., *Times*, July 27th, 1909—Div. Ct.

(b) Practice.

3. *Fine and Writ of Attachment—Writ to Lie in the Office.*—On the hearing of a rule nisi directed to a person to show cause why he should not be attached for contempt of Court, the Court has power to order a fine while also ordering that a writ of attachment should issue but that it should lie in the Crown Office for a certain period. In such cases it is the practice of the Court to order the writ of attachment to lie in the office to see whether the fine is paid, and when the fine is paid no further proceedings are taken. Liberty to apply being given in the order, it is open to the defendant at any time when the fine has been paid to apply to have set right any apparent inconsistency in the terms of the order.

R. v. BOTTOMLEY, *Times*, January 19th, 1909—[Div. Ct.

CONTRACT.

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See also AGENCY, No. 1; ARBITRATION, No. 6; BASTARDY, No. 2; CORPORATIONS, No. 1; GAMING, No. 13; INFANTS, Nos. 3, 4; INJUNCTIONS, Nos. 3, 5; LOCAL GOVERNMENT, Nos. 3, 4; MASTER AND SERVANT, III., IV.; MISREPRESENTATION, Nos. 2, 3; MORTGAGE; SALE OF GOODS; SALE OF LAND; SHIPPING, SPECIFIC PERFORMANCE; STOCK EXCHANGE, Nos. 3, 5.

For COVENANTS IN RESTRAINT OF TRADE, see TRADE, IV.

I. ASSIGNMENT.

1. *Music Hall Artist and Agent—Assignment of Part of Salary as Commission—Clause in Contract of Engagement Procured by Agent Prohibiting Assignment of Salary.*—B., by an agreement with S. & Co., dramatic agents, in consideration of the latter having procured for him an engagement with M., authorised M. to deduct from his salary and pay S. & Co.’s commission, as agreed, in any way S. & Co. might deem expedient. Notice in writing of this assignment was given to M. The present action was brought by S. & Co. for a sum alleged to be due under the above agreement. For the defendant B. it was contended that the terms in the agreement did not constitute a valid equitable assignment, and also that the contract of engagement between B. and M., procured by S. & Co., expressly prohibited B.’s assigning his salary, and declared that it should be paid to B. and to no other person, except in the case of death.

HELD—that in the agreement sued on there was a valid equitable assignment according to Lord Macnaghten’s judgment in *William Brandt’s Sons & Co. v. Dunlop Rubber Co.* ([1905] A. C. 454; 74 L. J. K. B. 898; 93 L. T. 495; 21 T. L. R. 710; 11 Com. Cas. 1), and that, although M. might bring an action against B. for any damages which might be proved due to the breach of the contract between B. and M., that contract did not in any way prevent that being an equitable assignment which was such apart from B. and M.’s contract.

TOM SHAW & Co. v. MOSS EMPIRES, LD., AND [BASTOW, 25 T. L. R. 190—Darling, J.

2. *Contract for Personal Service—Assignment of all Interest in Contract—Assignment of Contract as Security—Absolute Assignment.*—Moneys due under a contract of personal service can be assigned notwithstanding that a contract for personal service is not assignable. The fact that a contract is assigned as a security does not necessarily prevent the assignment from being an absolute assignment.

RUSSELL & Co., LD. v. AUSTIN FRYERS, 25 [T. L. R. 414—Div. Ct.

3. *Covenant Running with the Land—Covenant to make Footbridge over Railway.*—A covenant by purchasers of land acquired for the purpose of an intended railway made with the owners of adjoining land to make, on demand, a footbridge over the railway, when constructed, giving access to that adjoining land is a covenant running with the land, the benefit of which is assignable.

HUBBARD v. WELDON AND OTHERS, 25 T. L. R. [356—Jelf, J.

II. BREACH.

4. *Contract for Sale of Railway—Conditions—Default of Purchaser—Recovery of Deposit—Ontario.*—Where by a written contract both parties have agreed that something shall be done which cannot be done effectually unless both

## II. Breach *Continued.*

parties concur in doing it, the contract must be construed to mean that each party agrees to do all that is necessary on his part for carrying out that thing.

In a contract for the sale of a railway it was agreed that on a fixed day the vendor should execute certain bonds, and the purchaser should thereupon pay the agreed price, and a deposit was paid by the purchaser. It was agreed by the contract that the bonds should be prepared by the purchaser. The purchaser made default in preparing the bonds, and consequently they were not executed by the vendor on the agreed day, and the purchase went off.

**HELD**—that the purchaser could not recover the deposit paid.

Judgment of the Court of Appeal for Ontario affirmed.

*SPRAGUE v. BOOTH*, [1909] A. C. 576; 78 [L. J. P. C. 164; 101 L. T. 211—P. C.

5. *Construction—Condition Precedent—Engagement to Perform in Theatre Stipulation that Artists will Give Notice and Send Bill Matter—Right to Rescind.*—A. entered into an agreement with B. to perform in the following year in certain theatres in Glasgow at a salary of £350 per week, "subject to the rules of the establishment printed on the back hereof." Rule 6 provided—"All artistes engaged . . . must give fourteen days notice prior to such engagement, such notice to be accompanied with bill matter." A. having failed to comply with rule 6, B. cancelled the contract.

**HELD**—that rule 6 was merely an incidental stipulation, for the breach of which B. might claim damages but could not rescind the contract, and that B. was barred from recovering damages from A. for breach of contract owing to his own breach in cancelling the contract.

*WADE v. WALDON*, [1909] S. C. 571; 46 [E. C. L. R. 359—Ct. of Sess.

5a. *Non-delivery or Wrong Delivery—Supply of Cordite to War Office—Not in Accordance with Specification.*—On a petition of right against the Crown for the price of certain deliveries of cordite to the War Office the claim was admitted, but a defence was raised that the Crown was entitled to set off damages incurred in consequence of a breach of contract in respect of other deliveries not in accordance with the specification. By clause 2 of the contract the cordite, if found not of the specified quality, might be rejected, and, if rejected, was not to be considered as delivered under the contract, but the contractor was required to replace the rejected cordite at his own expense. By clause 6, in case of non-delivery, a fine was to be imposed and power was given to the War Office to buy cordite against the contractor and to terminate the contract.

**HELD**—that, the War Office being justified in their rejection of the cordite, wrong delivery could be treated as non-delivery under clause 6 of the contract.

*KYNOCH, L.D. v. R.*, *Times*, March 30th, 1909—[C. A.

## III. CONSIDERATION.

[No paragraphs in this vol. of the Digest.]

## IV. CONSTRUCTION.

6. *Supply of Coal Suitable for Steel Manufacture—Breach—Repudiation—Specific Performance—Damages.*—By an agreement made between a steel company and a coal company (each of the companies being well acquainted with the business of the other, its needs, capacities, and the mode in which it was carried on) the coal company agreed to supply the steel company during a period of years with "all the coal that the steel company may require for use in its own works as hereinafter described," and then followed a description of the various works of the steel company. By a further clause in the agreement it was provided that "all coal furnished shall be . . . reasonably free from stone and shale." Most of the coal required by the steel company was used for the different processes in the manufacture of steel. During the currency of the agreement the steel company rejected one lot of 2,698 tons of coal as unfit for use in their works, as it contained an undue percentage of shale, slate, and sulphur. Thereupon the coal company wrote to the steel company that the latter company's conduct in refusing to accept delivery of coal furnished and to be furnished constituted a repudiation of the contract and rendered further performance by the coal company impossible, and that the agreement was therefore at an end.

**HELD**—(1) that the words in the agreement "all the coal that the steel company may require for use in its own works" must be read as if they ran "all the coal suitable in character that the company may require for use in its own works"; (2) that the words "reasonably free from stone and shale" meant that the coal must in fact be reasonably free from stone and shale, irrespective of the method by which that fact might be ascertained; (3) that the coal company were not justified in repudiating the contract and (4) that the contract was not one of which specific performance would be decreed, but that the steel company were entitled, owing to the wrongful repudiation of the contract by the coal company, to treat the contract itself as at an end and to recover damages for the loss of it.

*THE DOMINION COAL CO., LD. v. THE [DOMINION IRON AND STEEL CO., LD., AND THE NATIONAL TRUST CO., LD.]*, [1909] A. C. 293; 78 L. J. P. C. 115; 100 L. T. 245; 25 T. L. R. 309—P. C.

7. *Implied Term—Contract to Carry Mails—Agreement with Government Department for Use of Pier—Collateral Agreement to allow Use of Berth—Sanctioning Use of Pier by Other Steamers—Additional Burden thrown on Mail Contractors.*

**HELD**—upon the construction of the contract between the Crown and the City of Dublin Steam Packet Company as to the carriage of mails between Holyhead and Kingstown, that the company were not entitled to the sole and exclusive use of Carlisle Pier at



#### IV. Construction—Continued.

Kingstown, or any other part thereof, but were only entitled to such use thereof as might be reasonably necessary, having regard to all the circumstances, during and for the purposes of the contract, and that the company were entitled not to be impeded in such use by or on behalf of the Crown.

HELD FURTHER—that it had not been proved that at the date of their Petition of Right the rights of the suppliant company had been infringed by the Crown.

Decision of C. A. (24 T. L. R. 798) reversed (Lord Ashbourne dissenting).

ATTORNEY-GENERAL v. CITY OF DUBLIN STEAM PACKET CO., 25 T. L. R. 696 H. L.

#### V. FORMATION.

See also INSURANCE, No. 12.

8. *Verbal Contract Proved by Subsequent Letter and Acts of Parties.*—Where defenders, following on verbal negotiations between their manager and the pursuers, received a letter from the pursuers in the form of an order for goods, to which they did not reply for a space of six weeks, and when replying did not reject it as an offer to purchase, but asked for delay in the execution of the "conditional order."

HELD—that the letter was not merely an offer to purchase, which required acceptance by the defenders, but was an order assuming the existence of a prior verbal completed contract of sale of the goods.

BARRY, OSTLER, AND SHEPHERD, LD. v. THE [EDINBURGH CORK IMPORTING CO., [1909] S. C. 1113; 46 Sc. L. R. 751—Ct. of Sess.

#### VI. ILLEGALITY.

9. *Indemnity—Joint Tortfeasors—Indemnity to Printers against Libel Actions.*—The plaintiffs published a newspaper for defendants, who agreed to indemnify them against claims in respect of any libellous matter.

An action for libel was brought against both plaintiffs and defendants.

HELD—that the plaintiffs (who paid money to compromise the libel action) could not recover on the indemnity against the defendants, an agreement by one of two joint tortfeasors to indemnify the other in respect of a wrongful act committed by both not being enforceable.

SMITH (W. H.) & SON v. CLINTON, 99 L. T. [840; 25 T. L. R. 34—Lord Coleridge, J.

10. *Public Policy—Husband and Wife Separation—Covenant by Husband to Pay Sum to Wife if Wife obtained Separation Order—Separation Order Made—Right of Wife to Sue on Covenant.*—A married woman obtained a separation order against her husband. Subsequently a deed was executed by which, on the return of the wife to cohabitation with the husband, the latter covenanted to treat her properly, and if a separation order was again made between the parties that he would pay her a sum of £150. The husband having thereafter

assaulted his wife, she obtained a separation order, and then brought this action to recover the £150 under the covenant of the deed.

HELD—that the covenant was not contrary to public policy and that the wife was entitled to recover.

HARRISON v. HARRISON, [1909] W. N. 206; [101 L. T. 638; 26 T. L. R. 29—Walton, J.

#### VII. IMPOSSIBILITY OF PERFORMANCE.

11. *Money Paid in Pursuance of Contract.*—The defendant contracted with the plaintiffs to take a tug and two lighters in tow from this country to Rio de Janeiro. Eventually the voyage had to be abandoned, as the tug was incapable of performing the voyage under her own steam with the two lighters in tow. At the time the contract was entered into both parties believed that the tug was capable of performing the voyage.

HELD—that the contract was void *ab initio*; that, the consideration for the contract having failed, the sum paid in advance to the defendant in part payment of the contract must be returned by him; and that none of the other moneys expended by the plaintiffs or the defendant in attempting to carry out the contract were recoverable.

THE SALVADOR (No. 1), 25 T. L. R. 384 [Deane, J.

12. *Warranty—Money Paid in Pursuance of Contract.*—The defendant contracted with the plaintiffs to take a tug and two lighters in tow from this country to Riode Janeiro. The defendant had to abandon the voyage as the tug was incapable of performing it under her own steam with the two lighters in tow. The voyage had been previously attempted and abandoned. [See *The Salvador* (No. 1) (*supra*).] Some ballast had then been put into the tug, and the defendant alleged that the plaintiffs had warranted that the tug and lighters were fit for the voyage. Deane, J. held (25 T. L. R. 385) that there had been no warranty; that the contract was void *ab initio*; and that the money paid to the defendant in part payment of the contract must be repaid by him to the plaintiffs. The defendant appealed from the latter part of the judgment.

HELD—that the question whether the plaintiffs had impliedly warranted to the defendant that the tug and lighters were capable of performing the voyage or whether the defendant took upon himself the risk of the whole venture had not been tried, and that, therefore, there must be a new trial.

THE SALVADOR (No. 2), 25 T. L. R. 727—[C. A.

On retrial. HELD—that the money paid to the defendant had been paid under a mistake of fact, both parties having believed on entering into the contract that the tug was capable of doing that which in fact she was not capable of doing, that, therefore, there was no contract, and that the plaintiffs were entitled to recover the money back.

26 T. L. R. 149—Bigham, Pres.

**VIII. RECTIFICATION.**

[No paragraphs in this vol. of the Digest.]

**IX. STATUTE OF FRAUDS.**

[No paragraphs in this vol. of the Digest.]

**X. UNDUE INFLUENCE.***See also* EQUITY, II.

**13. Husband and Wife—Wife Surety for Husband—Presumption.**—The relation of husband and wife does not raise a presumption of undue influence; and a mortgage by a wife to secure a husband's debts is not void merely because she had no independent advice.

**BANK OF AFRICA, LD. v. COHEN,** [1909] W. N. 50; 100 L. T. 295; 25 T. L. R. 285; 53 Sol. Jo. 268—EVE, J.

*See* S. C. under CONFLICT OF LAWS (*a*) (No. 2).**CONTRACTOR.***See* BUILDERS, ETC.**CONVERSION.***See* TROVER AND CONVERSION.**CONVERSION AND RECONVERSION IN EQUITY.***See* PERPETUITIES, No. 1; TRUSTS, No. 10; WILLS, Nos. 47, 48.**CONVEYANCES.**

*See* DEEDS AND OTHER INSTRUMENTS; EQUITY; FRAUDULENT AND VOLUNTARY CONVEYANCES; REAL PROPERTY AND CHATTELS REAL; SALE OF LAND.

**CONVICTIONS.***See* CRIMINAL LAW AND PROCEDURE.**CONVICT'S PROPERTY.***See* CRIMINAL LAW.**COPYHOLDS.**

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**COPYRIGHT AND LITERARY PROPERTY.**

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**I. ASSIGNMENT.**

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**II. BOOKS.**

**1. Copyright in Title of Book—Infringement—Injunction.**—An injunction will not be granted to restrain the sale of a book on the

**II. Books—Continued.**

ground that it bears the same title as a book written by the plaintiff.

*Dicks v. Yates* ((1881) 18 Ch. D. 76; 50 L. J. Ch. 809; 44 L. T. 660—C. A.) followed.

*CROTCH v. ARNOLD*, 54 Sol. Jo. 49—Eady, J.

2. *Title of Publication—Passing Off—Fancy Name—Executor of Inventor—Moral Right.*—A supposed moral right to use a fancy name associated with an imaginary character, which is claimed by the executor and universal legatee of the inventor of the name, does not justify the revival after many years of the name in connection with a publication which is by the use of the name likely to be confused with and passed off as the publication of those who have continuously used the name in connection with their periodical publications.

*PICTURE PRESS, LD. v. ROSS*, *Times*, February 25th, 1909—Joyce, J.

**III. CATALOGUES.**

[No paragraphs in this vol. of the Digest.]

**IV. DESIGNS.**

[No paragraphs in this vol. of the Digest.]

**V. DRAMATIC PIECES.**

3. *Cinematograph—Sale of Films—Pantomime Sketch—Infringement—Cause to be Represented—Dramatic Copyright Act, 1833* (3 & 4 Will. 4, c. 15), s. 1.—The manufacturer of a cinematograph film photographed from living persons, which when thrown upon a sheet is a reproduction of a dramatic piece, does not by merely selling the films to purchasers "represent or cause to be represented" the dramatic piece within the meaning of the Dramatic Copyright Act, 1833, although he knows that the films are bought for the purpose of being exhibited at places of dramatic entertainment.

Decision of Jelf, J. (99 L. T. 114; 24 T. L. R. 588; 52 Sol. Jo. 499) affirmed.

*KARNO v. PATHÉ FRÈRES*, 100 L. T. 260; 25 [T. L. R. 242; 53 Sol. Jo. 228—C. A.

4. *Right of Representation—Infringement—Sole Licensee—Title to Sue.*—The owner of the copyright of a play granted to the plaintiff "the sole licence" to produce the play for twelve months, except in London and suburbs. The plaintiff sued the defendant for having, without his sanction, produced the play at Manchester.

**HELD**—that, as the plaintiff did not hold an assignment of the acting rights but only a "sole licence," he had no title to sue in his own name.

*NEILSON v. HORNIMAN AND OTHERS*, 25 T. L. R. [684—Ridley, J.

Affirmed on Appeal, *Times*, December 17th—C. A.

5. *Dramatic Sketch—Dance—Infringement—Passing Off.*—The plaintiff brought an action for an injunction and damages on account of the alleged infringement by the defendant of the plaintiff's rights in a dancing scena or dramatic

sketch, which mainly consisted of a dance in imitation of an inanimate doll. The plaintiff also alleged that the defendant had held out the sketch performed by her as being that of the plaintiffs.

**HELD**—that the case was not distinguishable from *Tate v. Fulbrook* ([1908] 1 K. B. 821; 77 L. J. K. B. 577; 98 L. T. 706; 24 T. L. R. 347; 52 Sol. Jo. 279—C. A.) and that the plaintiff could have no statutory monopoly in the nature of a copyright in the dance in question.

*Tate v. Fulbrook* (*supra*) followed.

**HELD FURTHER**—that on the evidence the defendant was no party to any passing off of her entertainment as that of the plaintiffs, if any such passing off had taken place, and was therefore entitled to judgment.

*BISHOP v. VIVIANA & Co.*, *Times*, January 15th, [1909—Channell, J.

**VI. ENCYCLOPÆDIA.**

[No paragraphs in this vol. of the Digest.]

**VII. LETTERS.**

[No paragraphs in this vol. of the Digest.]

**VIII. MUSIC.**

6. *"Musical Work"—Perforated Music Roll—Pirated Copy—Musical (Summary Proceedings) Copyright Act, 1902* (2 Edw. 7, c. 15)—*Musical Copyright Act, 1906* (6 Edw. 7, c. 36).—A perforated music roll which is capable, when put on a mechanical instrument, of reproducing the notes of the pianoforte accompaniment of a copyright song is not a "pirated copy of a musical work" within the meaning of the Musical (Summary Proceedings) Copyright Act, 1902, and, therefore, cannot be seized under the provisions of that Act as a pirated copy of a musical work.

*Boosey v. Whight* ([1900] 1 Ch. 122; 69 L. J. Ch. 66; 81 L. T. 571; 16 T. L. R. 82; 48 W. R. 228) followed.

*MABE v. CONNOR*, [1909] 1 K. B. 515; 78 L. J. [K. B. 342; 100 L. T. 119; 73 J. P. 109; 25 T. L. R. 217—Div. Ct.

**IX. PHOTOGRAPHS.**

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**XIII. VARIOUS.**

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**CORONERS.**

1. *Inquest held Same Day as Body Found—Open Verdict—Subsequent Suspicion of Fatal Play—Order for Second Inquest—Coroners Act,*



**Coroners—Continued.**

1887 (50 & 51 Vict. c. 71), s. 6 (1).—The body of a girl was found in a pigsty in a burned and charred condition. An inquest was held on the same day. There was no medical evidence, and the jury returned an open verdict. Subsequently, suspicion of foul play having arisen, the jury expressed to the coroner, through their foreman, their dissatisfaction with their verdict. The coroner communicated with the Home Office, and an order was made for the exhumation of the body.

On these facts the Court, on an application under sect. 6 (1) of the Coroners Act, 1887, by the fiat of the Attorney-General, made an order quashing the inquisition found by the coroner's jury, and commanding a second inquest to be held.

R. v. WOOD, EX PARTE ATCHERLEY, 73 J. P. [40—Div. Ct.]

**CORPORATIONS.**

1. *Local Education Authority—County Borough—“The Council”—Conveyance—Quasi-Corporation—Education Act, 1902* (2 Edw. 7, c. 42), s. 1.]—In the Education Act, 1902, the expression “the council,” in reference to a county borough, means the mayor, aldermen, and burgesses acting by their council, who, therefore, can acquire and hold real estate and are the proper body to whom a conveyance should be made for the purposes of the Education Acts. Where a quasi-corporation is created by statute, express terms and apt language are usually employed.

IN RE A CONTRACT BETWEEN THE LEEDS [INSTITUTE OF SCIENCE, ETC., AND THE LEEDS CITY COUNCIL, [1909] 1 Ch. 500; 78 L. J. Ch. 321; 100 L. T. 468; 73 J. P. 201; 25 T. L. R. 297; 7 L. G. R. 912—Eady, J.]

2. *Inspection of Books by Member—General Right of Inspection.*—An inspection of the books of a corporation, which is not governed by the Companies Acts, will only be allowed on the application of a member, where it is shown that such inspection is requisite with reference to some specific dispute or question depending in which the member has a special interest different from that of the other members, that is, where the member has a definite purpose or object of his own; and the inspection will only be granted to such an extent as may be necessary for the particular occasion.

R. v. *Merchant Tailors' Co.*, ((1831). 2 B. & Ad. 115) followed.

THE BANK OF BOMBAY v. SULEMAN SOMJI, [L. R. 35 Ind. App. 130; 99 L. T. 62; 24 T. L. R. 698—P. C.]

3. *Limited Company—Liability to Conviction—Rogue and Vagabond—Lotteries Act, 1823* (4 Geo. 4, c. 60), ss. 41, 62, 67—*Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), s. 4—*Interpretation Act, 1889* (52 & 53 Vict. c. 63), s. 2.]—A limited company is not liable to be

convicted as a rogue and vagabond under sect. 41 of the Lotteries Act, 1823.

HAWKE v. E. HULTON & Co., LD., [1909] 2 [K. B. 93; 78 L. J. K. B. 633; 100 L. T. 905; 73 J. P. 295; 25 T. L. R. 474; 16 Manson, 164—Div. Ct.]

**CORRUPT PRACTICES.**

See ELECTIONS.

**COSTS.**

See PRACTICE, XXIII. : SOLICITORS, V. ; also ARBITRATION; BANKRUPTCY AND INSOLVENCY; BILLS OF EXCHANGE; CONTEMPT AND ATTACHMENT; COUNTY COURTS; CRIMINAL LAW AND PROCEDURE; EXECUTION, ETC.

**COUNSEL.**

See BARRISTERS.

**COUNTERCLAIM.**

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**I. COURTS, JUDGES AND OFFICERS.**

1. *Registrar—Entering up Judgment on Signed Admission—Statement Signed by Agent of Defendant—County Courts Act, 1888* (51 & 52 Vict.

**I. Courts, Judges and Officers—Continued.**

*c. 43), ss. 98, 99.]—Under sects. 98 and 99 of the County Courts Act, 1888, the Registrar cannot enter up judgment for the plaintiff upon a statement admitting the debt or demand which has been signed by an agent of the party against whom the plaint has been entered; the Registrar can only act upon a statement which has been signed by the party himself.*

*R. v. HIS HONOUR JUDGE MULLIGAN, 25 T. L. R. [341—Div. Ct.]*

**II. JURISDICTION AND LAW.**

*See PRACTICE, No. 28.*

**(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Remitted Actions.**

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**III. PROCEDURE.**

*See CRIMINAL LAW AND PROCEDURE, No. 65; MASTER AND SERVANT.*

**(a) General.**

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**(b) Statutory Defences.**

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**IV. COSTS.**

**2. Lump Sum Awarded without Taxation—Jurisdiction—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 113, 118.]—A county court judge is not entitled to allow a party a lump sum for costs without taxation, the taxation provided for by sect. 118 of the County Courts Act, 1888, being a condition precedent to the apportionment of the costs between the parties by the judge under sect. 113 of the Act.**

*GOLDING v. SMITH, 128 L. T. Jo. 172—[Div. Ct.]*

**V. EXECUTION.**

**3. Payment to Bailiff by Claimant—Amount of the Value of the Goods Claimed—Payment of Larger Sum—Duty of Bailiff to Withdraw from Possession—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156.]—A claimant who had put in a claim to goods seized by the high bailiff of a county court on a warrant of execution for £18 12s., on September 7th, 1908, deposited with the high bailiff the sum of £26 under sect. 156 of the County Courts Act, 1888, as the amount of the value of the goods claimed. The high bailiff, who accepted this sum, and paid it into Court, did not withdraw from the possession of the goods, but continued in possession of them until October 3rd, 1908, when the execution creditor admitted the title of the claimant to the goods. On taxation the high bailiff claimed from the execution creditor possession fees from September 7th to October 3rd.**

**HELD—**that the high bailiff was not entitled to these possession fees.

*NEWSUM v. JAMES, [1909] 2 K. B. 381; 78 L. J. [K. B. 761; 100 L. T. 852; 53 Sol. Jo. 521—Div. Ct.]*

**VI. ATTACHMENT OF DEBTS.**

[No paragraphs in this vol. of the Digest.]

**VII. JUDGMENT SUMMONS.**

**4. Default of Appearance—Fine—Application of Fine in Part Payment of Judgment Debt—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 111.]—A fine imposed on a debtor who fails to appear to a judgment summons is applicable towards indemnifying the creditor only against any loss that he may actually have sustained by reason of the default, and there is no jurisdiction in a county court judge to order the fine to be applied in reduction of the debt.**

*R. v. SNAGGE, [1909] 1 K. B. 644; 78 L. J. K. B. [562; 100 L. T. 311; 25 T. L. R. 313; 53 Sol. Jo. 285—C. A.]*

**VIII. APPEALS.**

*See also MASTER AND SERVANT.*

**5. Appeal to Judge from Order of Registrar—Defendant Living at a Distance—Plaintiff Ordered to give Security—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74—County Court Rules, 1903 and 1904, Ord. 12, rr. 9 and 11 (8).]—Where a plaintiff has obtained leave to bring an action in the county court of a district where his cause of action wholly or in part arose, under sect. 74 of the County Courts Act, 1888, and the defendant, residing more than twenty miles from the Court, sends to the Registrar, pursuant to Ord. 12, r. 9, of the County Court Rules, 1903 and 1904, an affidavit which appears to the Registrar to disclose a good defence upon the merits, and the Registrar orders the plaintiff to deposit in Court the sum of £20, no appeal lies to the county court judge under Ord. 12, r. 11 (8), from the Registrar's decision.**

*PORTER v. LONDON AND MANCHESTER INSURANCE CO., [1909] 2 K. B. 30; 78 L. J. K. B. 673; 100 L. T. 848; 53 Sol. Jo. 342—Div. Ct.]*

**6. New Trial—Discretion of County Court Judge to Grant New Trials—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93.]—The power to grant new trials conferred upon the judges of county courts by sect. 93 of the County Courts Act, 1888, is not an absolute power to be exercised upon any grounds which the judge may think fit, but is subject to the power to grant one for such reasons in law as a superior Court would deem sufficient for a new trial.**

*Murtagh v. Barry ([1890] 24 Q. B. D. 632; 59 L. J. Q. B. 388; 38 W. R. 526—Div. Ct.) approved (Moulton, L.J., dissenting).*

*DEAN AND ANOTHER v. BROWN, [1909] 2 K. B. [573; 78 L. J. K. B. 840; 101 L. T. 221; 53 Sol. Jo. 615—C. A.]*

**COURTS.**

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**IV. CRIMINAL APPEALS.**

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See also MAGISTRATES.

**I. GENERALLY.**

## (a) Capacity to Commit Crime.

[No paragraphs in this vol. of the Digest.]

## (b) Evidence.

See also Nos. 51, 59, 61, 70, 75, 76, 97, 98  
116, *infra*; MAGISTRATES, Nos. 12, 13.

1. *Corroboration—Accomplice—Police Spy*—“Agent Provocateur.”]—A police spy, or “agent provocateur,” is not an accomplice, and the practice that a jury should not act on the uncorroborated evidence of an accomplice does not apply to the case of such a person.

*R. v. Mullins* (12 J. P. 776; 3 Cox, C. C. 526) followed.

*R. v. BICKLEY*, 73 J. P. 239; 53 Sol. Jo. 402—  
[C. C. A.]

2. *Drunkenness as a Defence—Crime Involving Intent—Rebuttal of Presumption.*]—Formerly drunkenness or *dementia affectata* was held not to excuse the commission of any crime; but by a series of decisions, dating from 1819, in cases where the crime was one where it was necessary to show intent, the Courts have held that the drunkenness of the prisoner is a material consideration. The language in the cases is not the same, but the decisions are not irreconcilable, nor do they express different doctrines.

A man is taken to intend the natural consequences of his acts. This presumption may be rebutted (1) in the case of a sober man, in many ways; (2) in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.*, likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted.

*R. v. MEADE*, [1909] 1 K. B. 895; 78 L. J. K. B. [476; 73 J. P. 239; 25 T. L. R. 359; 53 Sol. Jo. 378—C. C. A.]

7. *Evidence of Prisoner—Cross-examination as to Previous Convictions—Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1 (f) (ii.).]—The prisoner was indicted for a rape upon a woman of full age. Sworn as a witness upon his own behalf, he alleged that the acts complained of took place with the consent of the prosecutrix.

HELD—that this was not a defence such as to involve imputation on the character of the prosecutrix within the meaning of the Criminal Evidence Act, 1898, s. 1 (f) (ii.), so as to entitle the prosecution to cross-examine as to previous convictions.

*R. v. Fisher* (Times, January 31st, 1889) dissented from.

*R. v. SHEEHAN*, 72 J. P. 232; 24 T. L. R. 459; 21 [Cox, C. C. 561—Jelf, J.]

4. *Cross-examination of Prisoner as to Character—Imputation on Character of Witness for Prosecution—Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1.]—A statement by the prisoner that the police constable who was giving evidence against him was telling lies.

HELD—not to be an imputation upon the police constable's character within the meaning of sect. 1 (f) (ii.) of the Criminal Evidence Act, 1898, so as to entitle the prosecution to question the prisoner as to his previous character.

*R. v. Rouse* ([1904] 1 K. B. 184) followed

*R. v. GROUT*, 26 T. L. R. 60—C. C. A.

5. *Cross-examination of Prisoner as to Other Offence—Imputation on Character of Witness for Prosecution—Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1.]—The prisoner was indicted for rape upon a girl of 13. He gave evidence on his own behalf, and, in cross-examination, he was asked whether the girl had invented the story, to which he replied that she had not invented it herself; and on being asked who had, said it was her mother (the prisoner's wife), who was a witness in the case. In answer to further questions the prisoner said his wife wanted to get rid of him, and that he had heard his children say that another man had been coming to the house in his absence. Counsel for the prosecution then said, “You suspect your wife of immoral relations with another man,” to which the prisoner replied, “Yes.” Thereupon counsel for the prosecution was allowed to put questions to the prisoner under sect. 1 (f) (ii.) of the Criminal Evidence Act, 1898, as to his relations with another girl (who was a witness in the case), which, if established, amounted to a criminal offence, but the prisoner denied those relations. The prisoner was convicted.

HELD—that the answers given by the prisoner in cross-examination were not necessary for the “conduct of the defence,” and that, as they involved imputations on the character of a witness for the prosecution, the questions as to the prisoner's relations with the other girl were properly allowed.

*R. v. JONES*, [1909] W. N. 218; 26 T. L. R. 59 [—C. C. A.]

6. *Primâ Facie Case for Prosecution—Evidence in Rebuttal—Burden of Proof—Proper Direction.*]—The proper direction as to *onus* of proof where *primâ facie* evidence has been given on the part of the prosecution which, if unanswered, would raise a presumption upon which the jury might be justified in finding a verdict of guilty, and the defendant has called evidence to rebut

**I. Generally—Continued.**

that presumption, is that if the evidence in rebuttal raises in the minds of the jury a reasonable doubt as to the guilt of the defendant, they should acquit him, as the *onus* of proof still lies upon the prosecution. If upon the whole evidence the jury are left in a real state of doubt, the prosecution has failed to satisfy the *onus* of proof which lies upon them.

R. v. STODDART, 73 J. P. 348; 25 T. L. R. 612; [53 Sol. Jo. 578—C. C. A.]

7. *Prisoner's—Imputations on Character of Witness for Prosecution—Relevance—Cross-examination of Prisoner—Previous Convictions—Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1 (f).—The appellant was indicted for housebreaking. The case for the prosecution depended largely on identification. In the course of giving evidence at the trial the appellant stated that he heard a police inspector, who was a witness for the prosecution and who was present when the appellant was paraded at the police station for the purpose of identification by certain witnesses, say to a constable something that sounded like "second," or "it is the second one," and that the constable had then gone out and brought in a witness who at once picked out from amongst those paraded a man standing second from the end, but second from the wrong end. The chairman of quarter sessions held that the appellant's evidence involved an imputation upon the character of the police inspector, and entitled the prosecution to cross-examine the prisoner as to his character. The appellant admitted, in answer to questions in cross-examination, that he had been previously convicted. The appellant's counsel did not in his conduct of the case in any way impugn the character or conduct of the police inspector, or suggest that his evidence was unreliable and ought not to be believed. The prisoner was convicted.

HELD—that such evidence of the prisoner's character was improperly admitted, and as its admission had probably had the result of convicting the appellant, the conviction must be quashed.

If the nature of a prisoner's defence involves, or if it is conducted so as to involve, the proposition that the jury ought not to believe the prosecutor or a particular witness for the prosecution, on the ground that his conduct outside his evidence in the case makes him an unreliable witness, then it is necessary that the jury should know also the character of the prisoner who is giving evidence and raising that point.

R. v. PRESTON, [1909] 1 K. B. 568; 78 L. J. [K. B. 335; 100 L. T. 303; 73 J. P. 173; 25 T. L. R. 280; 53 Sol. Jo. 322—C. C. A.]

8. *Prisoner's—Statement by Prisoner to Police Constable after Arrest—Denial by Prisoner—Evidence of Police Constable—Admissibility.*—The appellant was indicted for larceny by a trick. After his arrest, and after he had been cautioned, he was asked by a police constable where he got the money found upon him, and he replied that most of it was the proceeds of a trick similar to

that for which he was arrested and charged. At the trial this was put to the appellant in cross-examination, and on his denying its truth, the police constable was called and gave evidence to the above effect. The appellant was convicted.

HELD—that the trial was not invalidated by this evidence having been admitted.

R. v. GARIN (15 Cox, C. C. 656) disapproved.  
R. v. BEST, [1909] 1 K. B. 692; 78 L. J. K. B. [658; 100 L. T. 622; 25 T. L. R. 280—C. C. A.]

9. *Subpœna—Service on Witness not for Purpose of Obtaining Evidence—Jurisdiction to Set Aside Subpœna in Criminal Proceedings.*—The King's Bench Division of the High Court has jurisdiction to set aside a *subpœna* served on a witness in a criminal as well as in a civil proceeding, where it is satisfied that the person so served can give no evidence which can possibly be relevant to any issue to be tried, and that the *subpœna* has been served not for the purpose of obtaining any such relevant evidence, but for other and improper purposes. The setting aside of the *subpœna* does not interfere with the power of the judge at the trial to make an order for the attendance of the witness if he thinks such attendance necessary.

R. v. BAINES AND ANOTHER, [1909] 1 K. B. [258; 78 L. J. K. B. 119; 100 L. T. 78; 72 J. P. 524; 25 T. L. R. 79; 53 Sol. Jo. 101—Div. Ct.]

10. *Evidence of Accomplice—Corroboration in some Material Particular—Corroboration Implicating the Accused—Direction of Judge to Acquit.*—A judge should direct a jury to acquit, if the evidence against the accused is that of a person put forward as an accomplice, and his evidence is not corroborated in some material particular, that is to say, in some particular that involves the guilt of the accused.

R. v. EVEREST, 73 J. P. 269—C. C. A.

11. *Evidence of Accomplice—Corroboration—No Denial when Charged.*—Although there is no rule of law that the evidence of an accomplice must be corroborated, it is the universal practice for the judge to tell the jury that they ought not to act on the uncorroborated evidence of such a person.

Where the only important evidence for the prosecution is the testimony of an accomplice, the fact that the prisoner made no answer when formally charged by a police officer, is not under ordinary circumstances corroboration.

R. v. TATE, [1908] 2 K. B. 680; 77 L. J. K. B. [1043; 99 L. T. 620; 72 J. P. 391; 52 Sol. Jo. 699; 21 Cox, C. C. 693—C. C. A.]

12. *Cross-examination of Fellow Prisoner—Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1 (e).—As there are no words in sect. 1 (e) of the Criminal Evidence Act, 1898, preventing the cross-examination of one prisoner giving evidence on behalf of another, such a cross-examination is right and proper even though the questions asked have some bearing on the guilt or innocence of the prisoner giving evidence.

R. v. ROWLAND, 128 L. T. Jo. 174—C. C. A.

**I. Generally—Continued.**

**13. Two Prisoners Charged Jointly—Evidence by one on Behalf of Other—“Competent Witness for the Defence.”**—*Criminal Evidence Act, 1898* (61 & 62 Vict. c. 36), s. 1. ]—Where two prisoners are charged jointly in the same indictment, and one of them gives evidence on behalf of the other, he is a “competent witness for the defence” within the meaning of sect. 1 of the Criminal Evidence Act, 1898.

*R. v. McDONELL or McDONALD*, 73 J. P. 490; 25 [T. L. R. 808; 53 Sol. Jo. 745—C. C. A.

**14. Cross-examination as to Alleged Previous Offence—Criminal Evidence Act, 1898** (61 & 62 Vict. c. 36), s. 1(f)(i).—*Criminal Law Amendment Act, 1885* (48 & 49 Vict. c. 69), s. 5. ]—C. was indicted under sect. 5 of the Criminal Law Amendment Act, 1885, and the prosecutrix gave evidence that at the time the offence was committed C. told her he had had relations with another servant girl before, and that he hoped the prosecutrix would be as loving to him as that girl had been.

HELD—that C., on giving evidence, could be cross-examined (1) as to whether he had had relations with this other girl, and (2) as to whether this girl was then about fifteen years of age, on the ground that proof that C. had previously committed such an offence (under sect. 5) would be admissible evidence to show that he was guilty of the offence wherewith he was then charged within the meaning of sect. 1 (f) (i) of the Criminal Evidence Act, 1898.

*R. v. CHITSON*, [1909] 2 K. B. 945; 73 J. P. 491; [25 T. L. R. 818; 53 Sol. Jo. 746—C. C. A.

**15. Deposition Taken on Charge of Attempted Murder—Admissibility of Deposition on Charge of Murder.**—The prisoner was indicted for the murder of a woman. At his trial the deposition of the woman, which was taken at a time when it was expected that she would recover and the prisoner was being charged with attempted murder, was given in evidence.

HELD—that the deposition was properly admitted.

*R. v. Beeston* (Dears. 405) and *R. v. Lee* (4 F. & F. 63) approved and followed.

*R. v. EDMUNDS*, 25 T. L. R. 658—C. C. A.

**16. Dying Declaration—Test of Admissibility.** ]—For a statement to be admissible as a dying declaration it is not necessary that the statement should have been made literally “at the point of death.” The material point is that every hope of life must have gone in the mind of the person making the declaration.

*R. v. PERRY*, [1909] 2 K. B. 697; 78 L. J. K. B. [1034; 101 L. T. 127; 73 J. P. 456; 25 T. L. R. 676; 53 Sol. Jo. 810—C. C. A.

**17. False Pretences—Evidence of other Acts.** ]—The appellant was convicted of obtaining a pony and trap by falsely pretending that he wanted them for his wife, who, he said, was an invalid and could not select them herself. At the trial evidence was admitted that the appellant had obtained credit for oats and provender

from two other people by the false pretence that he was living at a certain address to which stables were attached.

HELD—that such evidence was improperly admitted, and that the conviction must therefore be quashed.

*R. v. FISHER*, [1909] W. N. 252; 26 T. L. R. 122 —C. C. A.

**(c) Indictment, Generally.**

See also Nos. 34, 41, 55, 56, 58, 60, *infra*.

**18. Amendment—Substitution of One Offence for Another.** ]—The defendant was indicted under sect. 13 (1) of the Debtors Act, 1869, for that he, in incurring a certain debt, did unlawfully and fraudulently obtain credit by means of false pretences, which were set out. The prosecution failed to prove the false pretences and the Court amended the indictment by striking out all the false pretences and substituting therefor the words “by means of fraud.”

HELD—that sect. 13 (1) of the Debtors Act, 1869, contained two different offences, namely, the obtaining credit (1) under false pretences, or (2) by means of other fraud. That the amendment made here amounted to the substitution of one offence for another, and that there was no power to make such an amendment.

*R. v. BENSON*, [1908] 2 K. B. 270; 77 L. J. K. B. [644; 98 L. T. 933; 72 J. P. 286; 24 T. L. R. 557; 52 Sol. Jo. 516; 21 Cox, C. C. 631—C. C. R.

**19. Deaf Mute—Inability to Plead or Understand Proceedings—Detention under Criminal Lunatics Act, 1800** (39 & 40 Geo. 3, c. 94), s. 2. ]

—At the trial of a prisoner, who was stone deaf and was unable to read or write, the jury found that he was mute by the visitation of God, and that he was incapable of pleading to, or taking his trial upon, the indictment, or of understanding and following the proceedings by reason of his inability to communicate with, or be communicated with by, others. Thereupon the judge ordered that the prisoner should be treated as non-sane and be kept in custody until his Majesty's pleasure should be known.

HELD—that the order was right.

*R. v. THE GOVERNOR OF H.M. PRISON AT STAFFORD, EX PARTE EMERY*, [1909] 2 K. B. 81; 78 L. J. K. B. 629; 100 L. T. 993; 73 J. P. 284; 25 T. L. R. 440—Div. Ct.

**20. Charging Two Separate Felonies—Practice—Election as to Count.** ]—An indictment is not to be treated as on appeal because it charges distinct felonies in different counts.

The long established rule is that, if the prisoner will be embarrassed, the judge at the trial will either quash the indictment, or require the prosecution to elect upon which count to proceed.

*R. v. ELLIOTT*, [1908] 2 K. B. 452; 99 L. T. 200; [72 J. P. 285; 24 T. L. R. 645; 21 Cox, C. C. 666—C. C. A.



## I. Generally—Continued.

## (d) Jurisdiction.

21. *Place where Offence Committed—Obtaining Money by False Pretences—Money Sent to Holland.*—If a false pretence was made in London to induce persons to part with money and send it to Middelburg, Holland, and the postal orders and letters containing the money were posted in London for transmission to Middelburg, there to be received by the person making the false pretence, the offence of obtaining money by false pretences would be committed in London, where the postal orders and letters were posted.

*R. v. Jones* (1 Den. 551; 19 L. J. M. C. 162; 4 Cox. C. C. 198—C. C. R.) followed.

*R. v. STODDART*, 73 J. P. 348; 25 T. L. R. 612; [53 Sol. Jo. 578—C. C. A.]

## (e) Poor Prisoners' Defence Act, 1900.

[No paragraphs in this vol. of the Digest.]

## (f) Practice Generally.

See also Nos. 71, 78, and IV. (h), *infra*.

22. *No Evidence at Close of Prosecutor's Case—Duty of Judge.*—If at the close of the case for the prosecution there is no evidence against the prisoner, the judge need not necessarily stop the case unless appealed to do so.

*R. v. GEORGE*, 73 J. P. 11; 25 T. L. R. 66—[C. C. A.]

23. *Recognizance—Condition Improperly Imposed—Sentence for Breach of Recognizance—Probation of Offenders Act, 1907* (7 Edw. 7, c. 17), s. 2, sub-s. 2—*Criminal Appeal Act, 1907* (7 Edw. 7, c. 23), s. 3 (c).—The appellant was convicted in January, 1908, of housebreaking and larceny, and was bound over under the Probation of Offenders Act, 1907, the justices imposing, *inter alia*, the condition that the appellant should abstain from intoxicating liquor. In January, 1909, the appellant was sentenced to twelve months' imprisonment for having broken his recognizance, the principal matter relied upon by the prosecution being the frequenting by the appellant of public-houses. Under sect. 2, sub-sect. 2 of the Probation of Offenders Act, 1907, the condition as to abstinence from intoxicating liquor can only be inserted in a recognizance when the offence in respect of which a prisoner is bound over is drunkenness or an offence committed under the influence of drink.

HELD—that the condition was improperly imposed, and that the sentence which treated the recognizance as forfeited must be quashed.

HELD ALSO—that the Court could entertain the appeal notwithstanding that the appellant had been convicted before the Criminal Appeal Act, 1907, came into force.

*R. v. DAVIES*, [1909] 1 K. B. 892; 78 L. J. K. B. [363; 100 L. T. 305; 73 J. P. 151; 25 T. L. R. 279—C. C. A.]

24. *Sentence—Length of Sentence Determined by the Treatment Prisoner is to Receive—Borstal*

*System—Criminal Appeal Act, 1907* (7 Edw. 7, c. 23), s. 4.—In fixing the length of sentence to be imposed, the judge may properly take into consideration the treatment the prisoner is to receive. The judge may therefore give a longer sentence than might otherwise be proper in order that the prisoner may receive the full benefit of the Borstal system.

*R. v. KIRKPATRICK*, 73 J. P. 29; 25 T. L. R. [66—C. C. A.]

25. *Sentence—Taking into Account other Offences not yet Tried.*—In sentencing a prisoner a Court may in a proper case have regard to other offences alleged against him even in other jurisdictions if he admits his guilt in respect of them.

*R. v. SYRES*, 73 J. P. 13; 25 T. L. R. 71—C. C. A.]

26. *Illness of Jurymen during Trial—New Jury Sworn—Notes of Evidence Read Over to Jury—Recalling Witnesses.*—In the course of a trial for murder, and after several witnesses had been examined, one of the jurymen became ill, and medical evidence was given that he would not be able to serve again for several days. The judge thereupon discharged the jury, called the original eleven jurors and one other, and after they had been sworn, read over to them his notes of the evidence, the witnesses being sworn and put into the box and asked to alter or add to their evidence if it seemed to them necessary to do so.

*R. v. LAWRENCE*, 25 T. L. R. 374—Jelf, J.

27. *Discharge of Jury—Misbehaviour or Incapacity of Jurors—When Accused may be put upon Trial a Second Time.*—Where, in a criminal case, a jury, through prepossession or want of intelligence, are unable to follow the evidence, the judge may, if he considers it necessary in the interests of justice, discharge the jury and cause a new jury to be empanelled and the accused to be put upon trial before it.

This jurisdiction should only be exercised in a clear case.

*R. v. KIRKE*, 43 I. L. T. 130—Dodd, J., Ireland.

28. *Application to Adjourn—When Granted—Change of Venue—Bias of Jury Panel—Trades Union—Strike.*—Where an application is made to adjourn the trial of an indictment, with a view to moving for a change of venue, on the ground that the jury panel is biased, the question for the judge is not whether a fair and impartial jury can be got out of the panel, but whether the panel is one that would give a fair and impartial trial.

The accused were members of a trades' union which was engaged in a strike, in the course of which the occurrences forming the subject of the criminal charge had taken place. A great number of those upon the jury panel were either members of, or otherwise connected with, an employers' federation, which had been formed to resist the operations of the strikers.

HELD—that the trial of the indictment should be adjourned upon the application of the accused

### I. Generally—Continued.

to enable the accused, if they thought fit, to move for a change of venue.

*R. v. FEARON AND OTHERS*, 43 I. L. T. 228—  
[—Johnson, J., Ireland.

**29. Second Conviction—Assault upon Police—Prior Conviction upon Another Charge on the Same Evidence—Res. Judicata.**—A person convicted of being "drunk and disorderly" was upon the same evidence convicted subsequently of assaults upon the police.

**HELD**—that the first conviction was a bar to the second on the ground that no person shall be convicted twice for the same offence.

*R. (FLYNN) v. JUSTICES OF COUNTY CORK*, 43  
[I. L. T. 154—Div. Ct., Ireland.

### (g) Prevention of Crime.

See also No. 91, *infra*.

**30. Habitual Criminal—Charge—Practice—Proof of Consent of Director of Public Prosecutions—Evidence—Course of Life Previous to Last Conviction—Proof of Age—Deferring Sentence—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10.**—The consent of the Director of Public Prosecutions to the insertion of a charge that a prisoner is an habitual criminal may be proved by the person who has been in communication on the subject with the director, and who states that he has received in the ordinary course a document giving such consent.

The evidence intended to establish that a prisoner is leading persistently a dishonest or criminal life must be brought down to the date of the charge, but it depends upon the circumstances of each case whether evidence as to the prisoner's course of life previous to his last conviction is or is not admissible.

Unless it is obvious to the jury that a prisoner against whom a charge of being an habitual criminal is preferred must have been over the age of 16 at the time of the first of the three convictions founded on by the prosecution, evidence must be given that the prisoner had attained the age of 16 at that time. Such evidence may be given by a prison officer deposing that the prisoner gave his age as stated in the calendar.

Where a prisoner is charged with an offence and is also charged with being an habitual criminal, and pleads guilty to, or is found guilty of, the main charge, it is not necessary that the sentence on that charge should be pronounced before the jury proceed to inquire whether the prisoner is an habitual criminal.

*R. v. TURNER*, [1909] W. N. 242; 26 T. L. R.  
[112—C. C. A.

**31. Habitual Criminal—Practice—Notice of Intention to Insert Charge—Seven Days' Notice—Contents of Notice—Proof—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10 (4).**—The seven days' notice referred to in sect. 10 (4) (b) of the Prevention of Crime Act, 1908, which has to be given to the proper officer of the Court by which an offender is to be tried and to the offender that it is intended to insert in the

indictment a charge of being an habitual criminal means a seven clear days' notice, and there must be evidence of its receipt, not necessarily by the officer of the Court himself, but by someone who can testify to the fact. The notice to the offender must, in addition to specifying the previous convictions, state the other grounds upon which it is intended to found the charge of being an habitual criminal; it is not enough merely to state in the notice that the offender is leading persistently a dishonest or criminal life. If such notice to the offender is not produced at the trial, secondary evidence may be given of its contents.

*R. v. TURNER*, [1909] W. N. 242; 26 T. L. R.  
[112—C. C. A.

**32. Habitual Criminal—Trial—Practice—Plea of Guilty to Crime Charged—Swearing of Jury to Try Habitual Criminal Charge—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10.**—An indictment for shopbreaking also contained a charge under sect. 10 of the Prevention of Crime Act, 1908, alleging that the prisoner was an habitual criminal. The prisoner pleaded guilty to the shopbreaking, but pleaded not guilty to being an habitual criminal. The jury was sworn to try the latter charge as if for a felony.

**HELD**—that there was no objection to the jury being so sworn, but that it would have been sufficient if they had been sworn as if to try a misdemeanour.

*R. v. TURNER*, [1909] W. N. 242; 26 T. L. R.  
[112—C. C. A.

**33. Habitual Criminal—Consent of Director of Public Prosecutions—Notice to Accused—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10.**—Where a charge under the Prevention of Crime Act, 1908, of being an habitual criminal is inserted in the indictment against an accused person it is the duty of the clerk of assize or clerk of the peace to satisfy himself before sending the indictment to the grand jury that the consent of the Director of Public Prosecutions to the insertion of such charge has been given. The prosecution need not prove as part of their case that such consent has been given unless the fact is challenged by the accused, in which case the fact may be proved as determined by the Court in *R. v. Turner* (*supra*).

The notice served upon an accused person under sect. 10, sub-sect. 4 of the Prevention of Crime Act, 1908, need not, in addition to specifying the previous convictions of the accused, also state other grounds for founding the charge that the accused is leading persistently a dishonest or criminal life unless the prosecution intend to rely upon other grounds than the previous convictions.

*R. v. Turner* (*supra*) considered and explained.  
*R. v. WALLER*, 26 T. L. R. 142—C. C. A.

**34. Habitual Criminal—No Averment in Indictment—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10.**—An indictment framed under sect. 10 of the Prevention of Crime Act, 1908, alleged, following the words of sub-sect. 2 (a),

**I. Generally—Continued.**

that the prisoner had been three times previously convicted of a crime since he was 16, and that he was leading persistently a dishonest life; but it contained no averment that the prisoner was an habitual criminal.

**HELD** that the indictment was good, but that, as a matter of pleading, an averment that the prisoner was an habitual criminal ought properly to have been included.

R. v. SMITH, [1909] W. N. 210; 26 T. L. R. 23; 54 Sol. Jo. 137—C. C. A.

**35. Habitual Criminal—Sentence Preventive Detention Not to be Deferred by Too Long Sentence of Penal Servitude—Prevention of Crime Act, 1908** (8 Edw. 7, c. 59), s. 10.]—In a case considered to be obviously one for preventive detention under the Prevention of Crime Act, 1908, a sentence of five years' penal servitude to be followed by five years' preventive detention was reduced to three years' penal servitude to be followed by five years' preventive detention.

R. v. SMITH, [1909] W. N. 235—C. C. A.

**36. Retrospective Operation of Statute—Prevention of Crime Act, 1908** (8 Edw. 7, c. 59), ss. 10 (1), 19 (2).]—Sect. 10 of the Prevention of Crime Act, 1908, applies to a person convicted of a crime committed between the date of the passing of the Act and the date of its coming into operation, the trial and conviction taking place after the latter date.

R. v. SMITH; R. v. WESTON, [1909] W. N. 210; [26 T. L. R. 23; 54 Sol. Jo. 137—C. C. A.

See also S. C. No. 94, *infra*.

**37. Previous Convictions—Proof—Proof of Identity—Prevention of Crimes Act, 1871** (34 & 35 Vict. c. 112), s. 18.]—In addition to a certificate of conviction in support of previous convictions, proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted must be given.

R. v. DRABBLE, 53 Sol. Jo. 449—Qr. Sess

**(h) Principals and Accessories.**

[No paragraphs in this vol. of the Digest.]

**(i) Restitution of Property.**

**38. Restitution Order—Right of Appeal against Criminal Appeal Act, 1907** (7 Edw. 7, c. 23), s. 6 (2)—*Criminal Appeal Rules, 1903*, r. 9.]—Notwithstanding sect. 6, sub-sect. 2, of the Criminal Appeal Act, 1907, and r. 9 of the Criminal Appeal Rules, 1908, a person against whom an order of restitution has been made on a conviction has no right of appeal against that order, even if the prisoner appeals against the conviction. If, however, on an appeal against the conviction, the Court of Criminal Appeal propose to vary the order or to annul it, he has a right to be heard.

R. v. ELLIOTT, [1908] 2 K. B. 452; 77 L. J. K. B. 812; 99 L. T. 200; 72 J. P. 285; 24 T. L. R. 645; 21 Cox, C. C. 666—C. C. A.

**(j) Reward.**

[No paragraphs in this vol. of the Digest.]

**II. SPECIFIC OFFENCES.****(a) Miscellaneous Offences.**

**39. Disorderly Behaviour while Drunk—Three Previous Convictions Involving Drunkenness—No Power to Order Imprisonment in Addition to Detention in Inebriate Reformatory—Inebriates Act, 1898** (61 & 62 Vict. c. 60), s. 2 (1).]—When a prisoner is convicted upon indictment under sect. 2 (1) of the Inebriates Act, 1898, of an offence mentioned in Sched. I. thereto, and also of three previous convictions for similar offences, and of being an "habitual drunkard," he cannot be sentenced to imprisonment in addition to detention in an inebriate reformatory.

R. v. BRIGGS, [1909] 1 K. B. 381; 78 L. J. K. B. [116; 100 L. T. 240; 73 J. P. 31; 25 T. L. R. 105; 53 Sol. Jo. 164—C. C. A.

**40. Obstructing Police in Execution of Duty—Deputation—Petition to Member of Parliament—Crowd Collected—Refusal of Deputation to Depart—Prevention of Crimes Amendment Act, 1885** (48 & 49 Vict. c. 75), s. 2.]—The appellants were convicted of obstructing the police in the execution of their duty. The duty of the police was to keep clear and unobstructed the St. Stephen's entrance to the House of Commons. The appellants having formed a deputation to present a petition to the Prime Minister, which he refused to receive, caused a crowd to be collected about this entrance by refusing to leave it and impeded the police in their efforts to keep it unobstructed.

**HELD**—without throwing any doubt on the right of a person to present a petition to a member of parliament, that the conviction was right.

PANKHURST AND ANOTHER v. JARVIS, 26 [T. L. R. 118—Div. Ct.

**41. Rioting—Indictment—Three Persons Named—One Acquitted—Others Unnamed.**]—Although there must be at least three persons present to constitute a riot, a prisoner may be convicted on an indictment for rioting along with two named persons, one of whom is acquitted, and along with "others" not named, where there is ample evidence that more than three persons in fact took part in the riot.

R. v. BEACH, R. v. MORRIS, *Times*, May 28th, [1909—C. C. A.

**(b) Abortion.**

[No paragraphs in this vol. of the Digest.]

**(c) Assault.**

**42. Assault on a Constable in the Execution of his Duty—Knowledge of Assailant that Person Assaulted is a Constable—Offences Against the Person Act, 1861** (24 & 25 Vict. c. 100), s. 38.]—On appeals from a conviction for assaulting a constable in the execution of his duty, under sect. 38 of 24 & 25 Vict. c. 100, where the jury found as a fact that the appellants at the time



## II. Specific Offences—Continued.

of the assault knew the man they assaulted was a constable, the Court of Criminal Appeal were of opinion that on the facts of the case there was evidence on which the jury could so find. The assault was at night time, and the constable wore a coat over part of his uniform.

But the Court intimated no doubt as to the authority of *R. v. Forbes* (10 Cox, C. C. 362) to the effect that knowledge of the prisoner that the person he is assaulting is a constable is not necessary to support an indictment under the above section.

*R. v. MAXWELL AND CLANCHY*, 73 J. P. 176—  
[C. C. A.]

**43. Assault Occasioning Actual Bodily Harm — Misdirection — Self-defence.**—The prisoner was indicted for an assault occasioning actual bodily harm. There was evidence that the prisoner struck the prosecutor, occasioning him actual bodily harm. The defence was that the prisoner struck the prosecutor in self-defence. In his evidence the prisoner said, "I told the prosecutor to mind his own business. He offered to fight me and aimed a blow at me which missed, but my blow felled him to the ground." In his summing-up to the jury the deputy-chairman said, "If a person is defending himself, and by reason of defending himself comes into contact with the other person and causes him an injury, he is not responsible, but no one has a right to return blow for blow." The prisoner, having been convicted, appealed.

**HELD**—that the proper direction to the jury would have been that if they believed that the prosecutor aimed a blow at the prisoner and missed him, the prisoner was not limited to warding off the blow, but might be justified in striking the prosecutor if it was reasonably necessary for self-defence; and that, as the jury had been wrongly directed, the conviction must be quashed.

*R. v. CARMAN DEANA*, 73 J. P. 255; 25 T. L. R. 399—C. C. A.]

### (d) Bigamy.

See No. 92, *infra*.

### (e) Breach of the Peace.

[No paragraphs in this vol. of the Digest.]

### (f) Concealment of Birth.

**44. Child Murder — Confession — No Other Evidence — No Body Found — Separate Existence — Concealment of Birth — Offences against the Person Act, 1861** (24 & 25 Vict. c. 100), s. 60.]—The confession of a woman accused of child murder where there is no other evidence that the child had a separate existence and no dead body has been found, is not sufficient to convict her of murder but is sufficient to convict her of concealment of birth within sect. 60 of the Offences against the Person Act, 1860.

*R. v. KERSEY*, 21 Cox, C. C. 690—*Ridley, J.*  
Y.D.

## (g) Conspiracy.

See also TRADE AND TRADE UNIONS,  
No. 20.

**45. Servant's False Character—Character not given in Writing — Servants' Characters Act, 1792** (32 Geo. 3, c. 56), ss. 2, 3—*Common Law Misdemeanour — Sentence of Hard Labour — Criminal Procedure Act, 1851* (14 & 15 Vict. c. 100), s. 29.]—Sect. 2 of the Servants' Characters Act, 1792, which relates to the giving of false characters, applies to characters given, or false pretences made by word of mouth or by conduct as well as in writing.

A conspiracy to commit an offence under this section is a common law misdemeanour and not a conspiracy to cheat or defraud within the meaning of sect. 29 of the Criminal Procedure Act, 1851, and therefore there is no power to impose a sentence of hard labour.

*R. v. COSTELLO AND BISHOP*, [1909] W. N. [210; 54 Sol. Jo. 13; *sub nom. R. v. COSOLLY AND COSTELLO*, 26 T. L. R. 31—C. C. A.]

### (h) Cruelty to Children.

**46. Verdict — "Guilty of Wilful Neglect, through Ignorance" — Prevention of Cruelty to Children Act, 1904** (4 Edw. 7, c. 15), s. 1.]—The prisoner was indicted for the manslaughter of a child under the age of sixteen. During the trial the judge told the jury that they could, under sect. 1, sub-sect. 3, of the Prevention of Cruelty to Children Act, 1904, instead of finding the prisoner guilty of manslaughter, find him guilty of wilful neglect under that section. When the jury were asked for their verdict they said "Guilty." They were then asked, "Guilty of manslaughter or wilful neglect?" and they replied "of wilful neglect," and after an appreciable pause they added, "Through ignorance."

**HELD**—that there was a distinct finding of guilty and that the addition of the words "through ignorance" did not negative that finding.

*R. v. PETCH*, 25 T. L. R. 401—C. C. A.]

**47. Wife and Children Deserted by Husband — Omission to Pay Part of Earnings to Wife — Custody — Wilful Neglect — Prevention of Cruelty to Children Act, 1904** (4 Edw. 7, c. 15), ss. 1, 23.]—The prisoner was indicted under sect. 1 of the Prevention of Cruelty to Children Act, 1904, for that he, having the custody of his children, did wilfully neglect them in a manner likely to cause them unnecessary suffering and injury to their health.

The prisoner had deserted his wife and children, and though he earned wages, did not send any part of his earnings to his wife. An aunt of the wife frequently provided the children with meals, but they had barely enough, even with the aunt's help, and without it they would have had to go to the workhouse.

**HELD**—that the prisoner had the custody of the children within the meaning of the Act, and that the omission of the prisoner to pay any part of his earnings to his wife was wilful neglect

## II. Specific Offences—Continued.

likely to cause unnecessary suffering and injury to the health of the children within the meaning of the Act.

R. v. CONNOR, [1908] 2 K. B. 26; 77 L. J. K. B. 527; 98 L. T. 932; 72 J. P. 212; 24 T. L. R. 483; 6 L. G. R. 897; 52 Sol. Jo. 444; 21 Cox. C. C. 628—C. C. R.

### (i) Disorderly Houses.

[No paragraphs in this vol. of the Digest.]

### (j) Embezzlement.

[No paragraphs in this vol. of the Digest.]

### (k) Falsification of Accounts.

48. *Falsifying Taximeter—Driver of Taxi-cab*—“*Servant*”—*Falsification of Accounts Act, 1875* (38 & 39 Vict. c. 24), s. 1.—The falsification of a mechanical means of recording an account, e.g., a taximeter, is the falsification of an account within sect. 1 of the Falsification of Accounts Act, 1875.

HELD ALSO—that the driver of a taxi-cab belonging to a company was a servant of the company within sect. 1 of the Falsification of Accounts Act, 1875.

R. v. SOLOMONS, [1909] 2 K. B. 980; 101 L. T. 496; 73 J. P. 467; 25 T. L. R. 747—C. C. A.

### (l) Forgery.

[No paragraphs in this vol. of the Digest.]

### (m) Housebreaking Implements, Possession of.

[No paragraphs in this vol. of the Digest.]

### (n) Larceny, False Pretences, and Receiving Stolen Goods.

See also Nos 17, 45, *supra*.

49. *Article Lost—Intention of Appropriation when Article comes into Person's Possession—Direction of Judge.*—In every case where an article has been lost and has come into the possession of a person who is charged with stealing it, a judge need not direct the jury that to convict the prisoner they must find that he had an intention to appropriate the article when it first came into his possession. The question whether such a direction should be given depends upon the defence set up by the prisoner.

*Semble*, such a direction should be given where the prisoner's case is that when the article came into his possession he intended to return it to its owner, but subsequently determined to appropriate it.

R. v. THURBORN ((1849) 13 J. P. 459; 1 Den. C. C. 387) discussed.

R. v. MORTIMER, 99 L. T. 204; 72 J. P. 349; 24 [T. L. R. 745; 21 Cox, C. C. 677—C. C. A.

50. *False Pretences—Attempting to Sell Brass Ring as Gold Ring—No Evidence of Knowledge that Ring was not Gold—Appeal.*—In this case a conviction for attempting to obtain money by false pretences was quashed on the ground that there was no evidence that the appellant,

who had attempted to sell a brass ring as gold knew that the ring was not a gold ring.

R. v. DUNLEAVY, 73 J. P. 56—C. C. A.

51. *False Pretences—Evidence—Advertisement—Money to be Earned by Writing in Spare Time—Deposit—Selling Advertiser's Goods—Return of Deposit to those Dissatisfied.*—This was an appeal against a conviction for obtaining money by false pretences. The appellant had advertised that persons applying to him could earn money in their spare time. To applicants he sent circulars, leading them to suppose that they were to earn the money by writing, and asking a deposit of 2s. before beginning the work. The deposit having been sent, it appeared that the employment consisted in inducing other people to buy a stylographic pen or other goods supplied by the appellant. Afterwards the appellant sent a postcard to each applicant, saying that the deposit would be returned to any applicant who was dissatisfied, and would write and say so. Some demanded the deposit back, and received it.

HELD—that there was ample evidence to support a conviction.

R. v. PAYNTER, 25 T. L. R. 191—C. C. A.

52. *False Pretences—Obtaining Credit under False Pretences or by Means of Fraud—Verdict Negating Fraud—Not Guilty—Debtors Act, 1869* (32 & 33 Vict. c. 62), s. 13 (1).—The prisoner was indicted under sect. 13, sub-sect. 1, of the Debtors Act, 1869. At the trial the judge left the following questions to the jury, to which they gave the following answers: (1) Q.—“Is the prisoner guilty of obtaining goods by false pretences with intent to defraud?” A.—“Not guilty.” (2) Q.—“Is he guilty of attempting to obtain goods by false pretences with intent to defraud?” A.—“Not guilty.” (3) Q.—“Is he guilty of obtaining credit by means of false pretences?” A.—“Guilty.” (4) Q.—“If so, did he so obtain them with intent to defraud?” A.—“Not guilty.” On these answers the judge entered a verdict of guilty.

HELD, quashing the conviction—that on the answers of the jury a verdict of not guilty should have been entered, inasmuch as under sect. 13, sub-sect. 1, of the Debtors Act, 1869, the intention to defraud must be established.

R. v. MUIRHEAD, 73 J. P. 31; 25 T. L. R. 88; [53 Sol. Jo. 164—C. C. A.

53. *False Pretences—Promise to do a Thing in the Future.*—A promise to do a thing in *future* may involve a false pretence that the promisor has the power to do that thing, for which false pretence the promisor may be indictable.

It is for the jury to say whether a promise is a statement of an intention meant to be carried out where that statement involves a statement of an existing state of facts.

R. v. BANCROFT, 26 T. L. R. 10—C. C. A.

54. *Goods in Custody of Sheriff—Goods of the Prisoner's Property—Effect of Verdict—Criminal Appeal Act, 1907* (7 Edw. 7, c. 23),

## II. Specific Offences—Continued.

*s. 4.*—The prisoner was indicted for stealing seven live fowls the property of the High Sheriff of Worcestershire. An execution had been levied on the goods of the prisoner's wife, and while the sheriff's officer was in possession under the execution of certain live fowls then on the premises the prisoner came and took away seven of them. In answer to questions left to them by the Chairman of Quarter Sessions, the jury found (1) that the seven fowls taken by the prisoner were his own property, and (2) that they were seized by the sheriff as part of the property of the prisoner's wife under the impression that they were her goods. The Chairman directed a verdict of guilty to be entered, but gave a certificate for leave to appeal.

**HELD**—that on the findings of the jury the proper verdict was one of not guilty.

*R. v. KNIGHT*, 73 J. P. 15; 25 T. L. R. 87; 53 [Sol. Jo. 101—C. C. A.

**55. Indictment—Larceny—Meat for Inmates of County Asylum, Stolen Property Laid in County Council and not in Asylum Visiting Committee**—7 Geo. 4, c. 64, ss. 15, 16—*Local Government Act*, 1888 (51 & 52 Vict. c. 41), ss. 3 (4), (6), 64, 65, 68, 78, 79, 86—*Lunacy Act*, 1890 (53 & 54 Vict. c. 5), ss. 169, 176 (2).—In an indictment for larceny of meat bought by the county authority for the inmates of the county asylum, the property in the meat should be laid in the county council and not in the asylum visiting committee.

*R. v. HUNTING AND WARD*, 73 J. P. 12— [C. C. A.

**56. Indictment—Stealing Pheasants' Eggs—Averment of Reduction into Possession.**—The defendants were indicted for stealing and receiving "one thousand pheasants' eggs of the goods and chattels of and of and belonging to" Sir Walter Gilbey.

**HELD**—that by reason of the large number of eggs mentioned, and the use of the additional words "of and belonging to," the indictment sufficiently averred that the eggs had been reduced into possession and were the subject of larceny.

*R. v. Rough* ((1779) 2 East, P. C. 607) distinguished; *R. v. Cox* ((1844) 1 C. & K. 494) doubted.

*R. v. STRIDE AND MILLARD*, [1908] 1 K. B. [617; 77 L. J. K. B. 490; 72 J. P. 93; 98 L. T. 455; 24 T. L. R. 243; 52 Sol. Jo. 209; 21 Cox, C. C. 563—C. C. R.

**57. Receiving Stolen Goods—Constructive Possession.**—When stolen property is traced to any one's possession, the fact that he has not tried to find the rightful owner nor informed the police must be explained. Previous convictions and a consequent fear as to the result of informing the police may be a sufficient explanation. Where the necessary explanation has been given and the evidence has failed to prove that the prisoner saw or interfered with the stolen goods, his bare knowledge of their

whereabouts is not sufficient to amount to constructive possession.

*R. v. ORRIS*, 73 J. P. 15—C. C. A.

**58. Receiving Stolen Goods—Indictment—Sufficiency.**—In an indictment for receiving it is sufficient to allege knowledge that the goods were "feloniously stolen," without stating whether the theft was felony at common law or by statute.

*R. v. STRIDE AND MILLARD*, [1908] 1 K. B. [617; 77 L. J. K. B. 490; 72 J. P. 93; 98 L. T. 455; 24 T. L. R. 243; 52 Sol. Jo. 209; 21 Cox, C. C. 563—C. C. R.

**59. Receiving Stolen Goods—Evidence—Accomplice.**—A coat valued at 5s. was stolen on March 20th. On April 11th C., wearing the coat in the street, sold it to F. for 2s. 6d. F. handed the 2s. 6d. to H., who handed it to the appellant. H. gave this evidence and the appellant was convicted of receiving the stolen coat. On appeal the appellant contended that either H. was an accomplice and his evidence should have been corroborated and the jury so directed, or there was no more evidence against the appellant than there was against H.

**HELD**—that there was no evidence to go to the jury against the appellant.

*R. v. CARR*, 73 J. P. 508—C. C. A.

**60. Receiving Stolen Goods—Indictment—Misdemeanour at Common Law—Facts Proved Amounting to Felony—Criminal Procedure Act 1851 (14 & 15 Vict. c. 100), ss. 12, 24—Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 91.**—The appellants were indicted for that they "unlawfully did receive and have" certain goods "well knowing the same goods and chattels to have been feloniously stolen, taken, and carried away against the form of the statute in such case made and provided and against the peace of our said Lord the King, his crown and dignity." The indictment contained no allegation that the receiving was felonious. The original stealing was felonious, as alleged.

**HELD**—that the words in the indictment "against the form of the statute in such case made and provided" could be rejected as surplusage; that the indictment was a good indictment for a misdemeanour at common law; and that, although the facts given in evidence amounted in law to a felony, the appellants were not entitled to be acquitted as the case came within sect. 12 of the Criminal Procedure Act, 1851.

*R. v. GARLAND AND ANOTHER*, [1909] W. N. [252; 26 T. L. R. 130—C. C. A.

**61. Receiving—Evidence of Possession by Prisoner of Property Stolen within Preceding Twelve Months—Preceding Period of Twelve Months—Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19.**—The words "preceding period of twelve months" in sect. 19 of the Prevention of Crimes Act, 1871, refer to the twelve months preceding the commencement of the proceedings against the accused, and not to the



## II. Specific Offences—Continued.

period preceding the commission of the offence charged in such proceedings.

*R. v. HARDING*, 53 Sol. Jo. 762—C. C. A.

**62. Receiving Stolen Goods—Found in Possession of Stolen Goods—Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19.**—To satisfy the words "has been found in his possession" in sect. 19 of the Prevention of Crimes Act, 1871, it is not necessary that the goods should be found in the prisoner's physical possession at the very moment of his arrest.

*R. v. ROWLAND*, 128 L. T. Jo. 174—C. C. A.

### (o) Malicious Damage.

**63. Bonâ fide Claim of Right—Removal of Notice-boards—Jurisdiction of Justices—Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 52.**—The respondents were summoned under sect. 52 of the Malicious Damage Act, 1861, for wilful and malicious damage to certain notice-boards, the property of the appellants. The notice-boards had been fixed by the appellants, with the permission of the Mitcham Parish Council, to certain lamp-posts on the highways crossing Mitcham Common. The notices were as follows: "Croydon Rural District Council. Persons are requested to refrain from playing golf on or across the public highway." The lamp-posts were the property of the Mitcham Parish Council, and the roads were highways repairable by the inhabitants at large. The respondents had acted on the instructions of the Prince's Golf Club Company (Limited), who had obtained from the trustees for the conservators of the common a licence for thirty years to play golf on the common for an annual payment of £250. The respondents contended that they had acted in the exercise of a *bonâ fide* claim of right and under a fair and reasonable supposition that they had a right to do the acts complained of.

**HELD**—that as the lamp-posts were not the property of the trustees, and as the notices did not amount to a nuisance giving the respondents the right to abate it, the right claimed by the respondents was one not recognised by the law, and, therefore, the justices' jurisdiction was not ousted.

*CROYDON RURAL DISTRICT COUNCIL v. COWLEY*  
[AND ANOTHER, 100 L. T. 441; 73 J. P. 205;  
25 T. L. R. 306; 7 L. G. R. 603—Div. Ct.]

### (p) Manslaughter.

*See also* No. 15, *supra*; No. 81, *infra*.

**64. Lapse of Time—Year and a Day.**—A person cannot be convicted of manslaughter if a year and a day elapse between the injury to and death of his victim. If, however, a jury find that, although the victim would have died eventually from the first injury, a second injury inflicted within a year of death accelerated death, they may convict.

*R. v. Martin* ((1832), 5 C. & P. 128) approved.  
*R. v. DYSON*, [1908] 2 K. B. 454; 77 L. J. K. B. 813; 72 J. P. 303; 99 L. T. 201; 24 T. L. R. 653; 52 Sol. Jo. 535; 21 Cox, C. C. 669—C. C. A.

**64a. No Actual Physical Violence—Illegal Act—Threats—Death from Fright.**—To support an indictment for manslaughter proof of actual physical violence is not necessary. Evidence that death was due to fright alone, caused by an illegal act of the prisoner, such as threats of violence, would be sufficient.

*R. v. HAYWARD*, 21 Cox, C. C. 692—Ridley, J.

### (q) Murder.

*See* Nos. 15, 64, 64a, *supra*.

### (r) Obscene Books.

[No paragraphs in this vol. of the Digest.]

### (s) Perjury.

*See also* DEPENDENCIES, No 29.

**65. Arbitration Proceedings in County Court under Workmen's Compensation Act, 1906—Judicial Proceedings.**—Arbitration proceedings before a county court judge under the Workmen's Compensation Act, 1906, are judicial proceedings, and therefore a witness who in such proceedings gives false evidence on a material question may be indicted for perjury.

*R. v. CROSSLEY*, [1909] 1 K. B. 411; 78 L. J. [K. B. 299; 100 L. T. 463; 73 J. P. 119; 25 T. L. R. 225; 53 Sol. Jo. 214—C. C. A.]

### (t) Treason.

[No paragraphs in this vol. of the Digest.]

### (u) Vagrancy.

*See also* CORPORATIONS, No 3..

**66. Incurrible Rogue—Previous Convictions as "Idle and Disorderly Person"—Vagrancy Act, 1824 (5 Geo. 4, c. 83), ss. 3, 4, 5—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), ss. 4, 19, 20.**—On August 12, 1905, the appellant was convicted at petty sessions of being an "idle and disorderly person" within sect. 3 of the Vagrancy Act, 1824. On December 10, 1907, he was again convicted at petty sessions of the same offence under the same section. On October 24, 1908, he was convicted at petty sessions of being an incurrible rogue in that he "did unlawfully wander abroad to beg alms, the said [appellant] having been twice previously convicted of being an idle and disorderly person," and was committed to quarter sessions, where he was sentenced to twelve months' imprisonment with hard labour.

**HELD**—that the conviction must be quashed, as under sect. 5 of the Vagrancy Act, 1824, before a person can be convicted as an incurrible rogue, there must be evidence that he has been previously convicted as a rogue and vagabond, and there was no evidence upon the face

## II. Specific Offences—Continued.

of the record that the appellant had been so convicted.

R. v. JOHNSON, [1909] 1 K. B. 439; 78 L. J. [K. B. 290; 100 L. T. 464; 73 J. P. 135; 25 T. L. R. 229; 53 Sol. Jo. 288—C. C. A.]

**67. Prostitute—What Amounts to "Indecency" — Mere Accosting of Men not Sufficient — Vagrancy Act, 1824 (5 Geo. 4. c. 83). s. 3.**—A prostitute who merely accosts a man in the street at night, there being no evidence of any indecency in her words or gestures, is not behaving "in a riotous or indecent manner" within the meaning of sect. 3 of the Vagrancy Act, 1824.

R. v. DUKE, 73 J. P. 88—Liverpool Qr. Sess.

### (v) Women and Girls, Offences against.

See Nos. 5, 11, *supra*.

## III. CONVICTS' PROPERTY.

[No paragraphs in this vol. of the Digest.]

## IV. CRIMINAL APPEALS.

See also TRADE MARKS, Nos. 10, 11.

### (a) Generally.

**68. Criminal Appeal Act, 1907—Interpretation — Intention of Legislature — Rejection of Words — Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4, sub-s. 3.**—The Court of Criminal Appeal may in reading the Criminal Appeal Act, 1907, reject, transpose, or even imply words, if this be necessary to give effect to the intention and meaning of the legislature which is to be ascertained from a careful consideration of the entire statute.

R. v. ETTRIDGE, [1909] 2 K. B. 24; 78 L. J. K. B. [479; 100 L. T. 624; 73 J. P. 253; 25 T. L. R. 391; 53 Sol. Jo. 401—C. C. A.]

**69. Conduct of Trial—Summing-up—Principle on which Court of Criminal Appeal Acts.**—Every summing up in a criminal trial must be regarded in the light of the conduct of the trial and the questions which have been raised by counsel for the prosecution and for the defence respectively. The Court of Criminal Appeal does not sit to consider whether particular phrases used in the summing-up were the best that might have been chosen, or whether a direction which had been attacked might have been fuller or more conveniently expressed; the Court sits to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice.

R. v. STODDART, 73 J. P. 348; 25 T. L. R. 612; [53 Sol. Jo. 578—C. C. A.]

**70. Inadmissibility of Evidence—No Substantial Miscarriage of Justice—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1), *Proviso*.**—A quarter-master sergeant appealed from a conviction for uttering a forged receipt. At the trial evidence was admitted of his having been tried by court-martial, but his counsel had elucidated the fact that the verdict of the court-martial against him had been quashed by the

Judge-Advocate-General, which fact was pointed out by the judge in his summing up. No point was made by the prosecution or by the judge that this verdict should be taken into consideration.

**HELD**—that, without deciding whether the evidence was inadmissible and assuming that it was inadmissible, the case came within the proviso to sect. 4 (1) of the Criminal Appeal Act, 1907, as no substantial miscarriage of justice had actually occurred.

R. v. WESTACOTT, 25 T. L. R. 192—C. C. A.

**71. No Shorthand Notes—Validity of Proceedings—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 16.**—The provision as to a shorthand note in sect. 16 of the Criminal Appeal Act, 1907, is directory only; the proceedings are not invalidated by the fact of no note being taken.

R. v. RUTTER, 73 J. P. 12; 25 T. L. R. 73—[C. C. A.]

**72. Prerogative of Mercy—Reference by Home Secretary—No Appeal Otherwise against Conviction—Conviction at Petty Sessions as an Incorrigible Rogue—Sentenced at Quarter Sessions—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 5—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), ss. 19, 20 (2).**—Under sect. 20 (2) of the Criminal Appeal Act, 1907, a person convicted at petty sessions as an incorrigible rogue, and sent to be dealt with at quarter sessions under sect. 5 of the Vagrancy Act, 1824, cannot appeal to the Court of Criminal Appeal against the conviction at petty sessions, but only against the sentence imposed by quarter sessions. But by sect. 19 of the Criminal Appeal Act nothing in the Act is to affect the prerogative of mercy, and the Secretary of State can on consideration of any petition for mercy with regard to the conviction of a person on indictment refer the whole case to the Court of Criminal Appeal.

R. v. JOHNSON, [1909] 1 K. B. 439; 78 L. J. K. B. [290; 100 L. T. 464; 73 J. P. 135; 25 T. L. R. 229; 53 Sol. Jo. 288—C. C. A.]

**73. Prisoner Reserving his Defence till Trial—Right of Prosecution to Comment on Fact—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4.**—If by reserving his defence the case set up by the prisoner at his trial cannot be investigated, the prosecution are entitled to comment on that circumstance.

R. v. MCNAIR, 25 T. L. R. 228—C. C. A.

**74. Bogus Confession—Plea of Guilty to Offences not Committed—Convictions Quashed.**—In this case, where the appellant had made a bogus confession of committing sacrilege on three occasions and, when indicted, pleaded guilty to these offences, on his proving *alibis*, the Court quashed the convictions.

R. v. VERNEY, 73 J. P. 288—C. C. A.

**75. Defence of Alibi—Prisoner Not Giving Evidence at Trial—Accomplice.**—A prisoner who raises the defence of an *alibi*, but does not go into the witness-box and submit himself to cross-examination, is not entitled to ask the Court of

#### IV. Criminal Appeals—Continued.

Criminal Appeal to consider that defence as a serious ground of appeal from his conviction. Where a prisoner intends to raise the defence of an *alibi* he should do so at the earliest possible moment in order that those representing the Crown may have an opportunity of investigating it.

A woman was asked by the prisoner to pawn a watch, for the larceny of which he was indicted. She attempted to pawn the watch when she was stopped by a police officer.

HELD—that the mere circumstance of being asked to pawn the watch by the prisoner did not make her an accomplice of the prisoner so as to require a caution being given to the jury that they should not act upon her evidence unless it was corroborated.

R. v. KIRKHAM, [1909] W. N. 141; 73 J. P. [406; 25 T. L. R. 656—C. C. A.]

**76. Defence of Alibi—Prisoner Not Giving Evidence—Exceptional Circumstances—Trial on Day after Committal—No Time to Obtain Witnesses as to Alibi—Fresh Evidence.**—An appellant from a conviction for larceny from the person was arrested on one day, committed for trial on the next, and tried and convicted on the next day after that. The evidence upon which he was convicted consisted solely of that of two ladies who identified him from amongst a number of other persons as a man who had robbed them at 8.30 p.m. in April, five days before the trial. No stolen property was found on him or in his lodging. The appellant was a foreigner, and he did not give evidence at his trial, but he called one witness at the police court, and on his trial, to prove an *alibi* and on his arrest he at once denied the charge and spoke to his *alibi*.

Under the exceptional circumstances of the case the Court of Criminal Appeal allowed the appellant to give evidence, although he had not given evidence in the Court below, ordering him to be called first.

No less than eight witnesses having corroborated the evidence of the appellant as to his *alibi* the Court allowed the appeal and quashed the conviction.

R. v. MALVISI, 73 J. P. 392—C. C. A.

**77. Conviction on Revenue Information—Civil Proceedings—Criminal Information—Criminal Appeal Act, 1907** (7 Edw. 7, c. 36), s. 20, sub-s. 2.]—An appeal does not lie to the Court of Criminal Appeal from a conviction on an information by the Attorney-General on the revenue side of the King's Bench Division. Such an information is not a criminal information within the meaning of sect. 20, sub-sect. 2, of the Criminal Appeal Act, 1907.

R. v. HAUSMANN AND OTHERS, [1909] W. N. [198; 73 J. P. 516; 26 T. L. R. 3—C. C. A.]

**78. Prisoner Tried Twice on Same Facts for Two Different Offences—Prevention of Crimes Act, 1871** (34 & 35 Vict. c. 112), s. 7.]—M. was tried on an indictment charging larceny from the person of a man unknown. He was acquitted. He was then tried on the same facts on a second

indictment charging an offence under sect. 7 of the Prevention of Crimes Act, 1871. The jury were unable to agree, and the prisoner was then tried again on this indictment in another Court, and was convicted. From this conviction he appealed on the ground that he had been put in jeopardy twice on the same facts.

HELD—that there was no objection in law to the conviction, and as the evidence was ample sufficient to justify the verdict the appeal would be dismissed.

R. v. MILES, 73 J. P. N. C. 516—C. C. A.

#### (b) Appeal against Sentence.

See also No. 45, *supra*.

**79. Habitual Drunkard Convicted Four Times of Drunkenness within Twelve Months—No Power to Impose Imprisonment as well as Detention—Inebriates Act, 1898** (61 & 62 Vict. c. 60), s. 2 (1).—A person convicted on indictment under sect. 2 (1) of the Inebriates Act, 1898, can only be sentenced to detention for a term not exceeding three years in any certified inebriate reformatory, the managers of which are willing to receive him, as provided by that section, and not to imprisonment as well.

R. v. BRIGGS, [1909] 1 K. B. 381; 78 L. J. K. B. [116; 100 L. T. 240; 73 J. P. 31; 25 T. L. R. 105; 53 Sol. Jo. 1641—C. C. A.]

**80. Plea of Guilty—Sentence Quashed—No Power to Pass Sentence in Substitution—Criminal Appeal Act, 1907** (7 Edw. 7, c. 23), s. 4 (3).—Where the Court of Criminal Appeal quashes a sentence passed upon an appellant who has pleaded guilty to an indictment, the Court has no power under sect. 4 (3) of the Criminal Appeal Act, 1907, to pass another sentence on the appellant in substitution therefor.

The appellant had pleaded guilty and had been sentenced to imprisonment with hard labour for an offence which was not punishable with hard labour.

The Court quashed the sentence on the ground that it was illegal. They passed no other sentence upon the appellant, as sect. 4 (3) of the Criminal Appeal Act, 1907, only gave them power to pass "such other sentence warranted in law by the verdict." There had been no verdict, and therefore the Court had no power to pass another sentence upon the appellant.

R. v. DAVIDSON, [1909] W. N. 52; 100 L. T. [623; 25 T. L. R. 352—C. C. A.]

Overruled by R. v. Eltridge, No. 90, *infra*.

**81. Principle on which Sentences are Corrected on Appeal—Manslaughter—Diseased Condition of Man Killed.**—The Court of Criminal Appeal does not correct sentences on minor differences of opinion in the standard of punishment, but considers whether a wrong standard or principle has been applied in the particular case under consideration.

In this case, an appeal against a sentence of ten years' penal servitude for manslaughter, the Court held that the learned judge who had tried the case had allowed two circumstances to weigh



#### IV. Criminal Appeals—Continued.

with him too much—(1) the fact that the appellant did not give the deceased man a chance of "putting up his hands," and (2) that it made no difference to the offence whether the body of the deceased man was in a diseased condition. Such a condition might make the consequences of an assault more serious than could be anticipated. The sentence was reduced from one of ten to one of three years' penal servitude.

R. v. O'CONNELL, 73 J. P. 118—C. C. A.

**82. Principles that Guide the Court in Reducing Sentence—Plea of Guilty—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), ss. 3 (c) and 4 (3).]**—Where a prisoner has been tried, and the judge at the Court of trial has heard all the evidence and seen the witnesses, the Court of Criminal Appeal will not interfere with the sentence imposed unless the Judge has gone wrong in principle, although members of the Court may be of opinion that they would not have inflicted so severe a sentence.

But where the prisoner has pleaded guilty, the Court of Criminal Appeal are in as good, or in nearly as good, a position to consider what is the proper sentence on reviewing the sentence as the Court of trial is on its imposition, and therefore, in such cases, the Court of Criminal Appeal will reduce a sentence which is in their opinion too severe.

R. v. NUTTALL, 73 J. P. 30; 25 T. L. R. 76; 53 [Sol. Jo. 64—C. C. A.]

**83. Reduction of Sentence—Conviction for Burglary, Larceny and Receiving—Evidence of Receiving only—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4.]**—The prisoner was convicted on an indictment charging him with burglary, larceny, and receiving, and sentenced to twelve months' imprisonment with hard labour. On an appeal from the conviction:—

**HELD**—that as the evidence only justified a verdict of guilty on the count for receiving, the Court would reduce the sentence to six months, as it could not feel confident that the sentence of twelve months would have been imposed had the jury found the prisoner guilty of receiving only.

R. v. GEORGE, 73 J. P. 11; 25 T. L. R. 66—[C. C. A.]

**84. Review of Other Cases before Sentence—Reduction of Subsequent Sentence—Home Office Circular to Police Authorities dated the 20th of August, 1896.]**—The appellant had had an account at a bank, which was closed, but he retained a cheque book, containing a number of blank cheques drawn on the bank. A number of these cheques he filled in and gave to tradesmen and others in return for goods. The appellant was prosecuted for obtaining goods by false pretences by one of these cheques and sentenced to six months' imprisonment. Whilst serving this sentence he was brought to Cambridge and convicted of obtaining goods by false pretences on another of these cheques. The Recorder at Quarter Sessions, before sentencing him, asked that other charges might be mentioned to him, and the police mentioned a

number of cases where he had obtained goods by false pretences, giving details as to six cases; but they did not mention two cases in the jurisdiction of the Kent Quarter Sessions. The Recorder sentenced him to twelve months' imprisonment with hard labour, and expressed the view that at the end of his sentence he would start with a "clean sheet." Whilst serving that sentence he was brought up and charged with two similar cases at the Kent Quarter Sessions. What the Recorder at Cambridge had said was not mentioned to the Chairman at Maidstone, and he sentenced the appellant to three years' penal servitude, from which sentence he appealed.

The Court said that they did not lay down any general rule that in such a case where certain cases had not been mentioned on the earlier sentence they could not be proceeded with. But in this case they thought that substantially the whole of the cases were before the Recorder of Cambridge. They, therefore, reduced the sentence of three years' penal servitude to one of twelve months' imprisonment with hard labour, to run concurrently with that passed on the appellant at Cambridge.

R. v. SYRES, 73 J. P. 13; 25 T. L. R. 71—C. C. A.

**85. Offence Known to Police at Prior Conviction—Reduction of Sentence.]**—A sentence was reduced where it appeared that the offence for which the appellant was sentenced was known to the police when he was convicted on a prior occasion.

R. v. Syres (No. 84, *supra*) approved and followed.

R. v. MARKHAM, 73 J. P. N. C. 240—C. C. A.

**86. Review of Other Cases before Sentence—Other Offence Admitted by Prisoner—Not Taken into Consideration—Subsequent Conviction for Other Offence.]**—A judge sentencing a prisoner is entitled, but not bound, to take into consideration other offences which the prisoner admits.

R. v. Syres (No. 84, *supra*) explained.

The admission by a prisoner, convicted of obtaining goods by false pretences, of a similar offence in obtaining a watch which the judge then sentencing him declined to take into consideration on the ground that the prisoner had not given information to the police as to what had become of the watch, was held to be no bar to his subsequent conviction for obtaining the watch by false pretences.

R. v. SHARPCOTE, [1909] W. N. 218—C. C. A.

**87. Sentence too Severe—Reduction—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (3).]**—The appellant was convicted of neglecting four children in a manner likely to cause them unnecessary suffering or injury to their health and of being an habitual drunkard. She was sentenced to twelve months' imprisonment with hard labour, to be followed by three years' detention in an inebriate reformatory.

**HELD**—that the sentence was too severe, and that it should be reduced to twelve months' imprisonment with hard labour, to be followed by twelve months' detention in a reformatory.

R. v. PRINCE, 25 T. L. R. 197—C. C. A.

## IV. Criminal Appeals—Continued.

**88. Excessive Sentence—Reduction—Standard of Sentences.**—A prisoner was sentenced to eight years' penal servitude, to be followed by three years' police supervision, for the larceny of £1 by a trick. He was a man with a bad record, having already been sentenced to two periods of penal servitude. The Court passed in substitution a sentence of five years' penal servitude, Darling, J., observing that no member of the Court would have passed the sentence passed at the Court of trial.

*Per* Darling, J.: The institution of the Court of Criminal Appeal should tend to regularise a standard of sentences.

R. v. WOODMAN, 73 J. P. 286—C. C. A.

**89. Previous History of Prisoner—Sentence Reduced.**—A prisoner was sentenced at quarter sessions to nine months' imprisonment with hard labour as a rogue and vagabond. It appeared that he had already been sentenced on nine or ten occasions under the Vagrancy Acts, and that on one of these occasions he had been sentenced to seven months' imprisonment with hard labour as a rogue and vagabond. It appeared that ten years ago, before the dates of these convictions, he had left the army with a character that was marked "Very good." He had then obtained employment and kept himself, until he was struck down by paralysis. He then commenced playing a penny whistle in the streets and begging, the conduct which led to his convictions. He had never been convicted of dishonesty or violence. The Court passed in substitution a sentence of three months' imprisonment with hard labour.

*Per* Darling, J.: It was much to be desired that there should be some other means of dealing with the appellant than those at present existing.

R. v. EDWARDS, 73 J. P. 287—C. C. A.

**90. Plea of Guilty—Quashing Sentence—Power of Court to Pass other Sentence—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4, sub-s. 3.**—Where a prisoner has pleaded guilty and appeals against his sentence, the Court, where it quashes such sentence, has power, under sect. 4, sub-sect. 3, of the Criminal Appeal Act, 1907, to substitute another sentence therefor.

R. v. Davidson (*supra*) overruled.

R. v. ETTRIDGE, [1909] 2 K. B. 24; 78 L. J. [K. B. 479; 100 L. T. 624; 73 J. P. 253; 25 T. L. R. 391; 53 Sol. Jo. 401—C. C. A.]

**91. Habitual Criminal—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), ss. 10, 12.**—Sentence reduced on the ground that the Chairman of Quarter Sessions, in imposing a sentence of five years' penal servitude in order that the prisoner might get the benefit of the system of preventive detention under the Prevention of Crime Act, 1908, had wrongly treated the prisoner as an habitual criminal.

R. v. RAYBOULD, [1909] W. N. 118; 73 J. P. [334; 25 T. L. R. 581—C. C. A.]

**92. Judge Influenced by Prisoner's Conduct—Making a False Entry in a Register of Marriage**

—*Indictment for Bigamy not Proceeded with.*—W. married I. in 1876. In 1878 his wife parted from him. In 1890 W. purported to marry B., describing himself as a bachelor in the register of marriage. In 1906 B. parted from him. In 1909 W. was indicted (1) for bigamy and (2) for wilfully making in 1890 a false entry in a register of marriage. The prosecution elected not to proceed on the indictment for bigamy on the ground that there was no evidence on the depositions that in 1890 W. was aware that his wife was alive. W. was convicted on the other indictment, and evidence having been given of bad conduct on his part to I. and to B., he was sentenced to two years' imprisonment with hard labour.

HELD on appeal—that it was plain that W. had not been sentenced to this term for what he had written in the marriage register in the year 1890, but by reason of the strong view the judge took of W.'s conduct, that the sentence was one which the Court could not approve, and that, as W. had been in prison for a few weeks, he should be discharged.

R. v. WELLS, 73 J. P. 415—C. C. A.

**93. Ticket-of-Leave—Remanet of Last Sentence—Proper Form of Sentence—Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), s. 9—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), ss. 3, 4 (3), 19 (a).**—Judges in passing sentence on a prisoner should not refer to the *remanet* of the prisoner's last sentence by ordering that the new sentence should be served after or concurrently with the *remanet*, as by sect. 9 of the Penal Servitude Act, 1864, the prisoner must serve his *remanet* after serving the fresh sentence that is passed upon him. But where a judge has done so, the Court of Criminal Appeal will vary the sentence to give effect as far as possible to the total length of sentence the judge at the Court of trial wished to impose.

Where the Home Secretary refers a case to the Court of Criminal Appeal under sect. 19 of the Criminal Appeal Act, 1907, with regard to sentence, it is not open to the petitioner to appeal against his conviction; in such a case, the Court has the power to vary the sentence under sect. 4 (3) of the Criminal Appeal Act, 1907.

R. v. Hamilton ((1908), 72 J. P. N. C. 365; Butterworths' Yearly Digest, 1908, col. 149) considered.

R. v. SMITH; R. v. WILSON, [1909] 2 K. B. [756; 101 L. T. 126; 73 J. P. 407—C. C. A.]

**94. Preventive Detention following Penal Servitude—Right to Appeal against Both Sentences—Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 11.**—If a person who has been sentenced to penal servitude and also to preventive detention under the Prevention of Crime Act, 1908, appeals, under sect. 11 of that Act, against the latter sentence, the Court of Criminal Appeal will allow him as of right to appeal also against the sentence of penal servitude.

R. v. SMITH; R. v. WESTON, [1909] W. N. 210; [26 T. L. R. 23; 54 Sol. Jo. 137—C. C. A.]



## IV. Criminal Appeals—Continued.

## (c) Appeal on Facts.

[No paragraphs in this vol. of the Digest.]

## (d) Bail.

95. *Notice of Application to Prosecution.*—While the Court of Criminal Appeal cannot on its own initiative lay down a general rule that notice must be given to the prosecution when an application for bail pending the hearing of an appeal is intended to be made, it is very desirable that a judge or the Court in the exercise of his or its discretion should direct such notice to be given. In cases where the Director of Public Prosecutions is concerned the application for bail should be refused where no notice has been given of the intended application.

R. v. RIDLEY, 100 L. T. 944; 25 T. L. R. 508—  
[C. C. A.]

## (e) Fresh Evidence.

See also No. 116, *infra*.

96. *Application for Leave to Call—Appeal against Conviction and Sentence—Misdirection—Finding Property—Larceny—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 9 (b).*—The Court refused to allow further evidence to be called merely to supplement or support the case made at the trial, the witnesses having been available at the trial and not having been called.

Upon an appeal against a conviction upon a charge of stealing a bag which had been delivered to the prisoner by mistake, the allegation being that the Chairman at Quarter Sessions, where the prisoner was tried, misdirected the jury in not having sufficiently explained to them the law as to what was necessary to constitute larceny in the case of property found by a person, the Court dismissed the appeal upon the ground that in view of the case set up at the trial, there had been no misdirection.

The Quarter Sessions, having sentenced the prisoner to fifteen months' hard labour, subsequently altered it to one of fifteen months in the second division. The prisoner having appealed against the sentence, the Court, in the circumstances, restored the original sentence.

R. v. MORTIMER, 99 L. T. 204; 72 J. P. 349; 24 [T. L. R. 745; 21 Cox, C. C. 677—C. C. A.]

97. *Absence of Witnesses through Misunderstanding—Miscarriage of Justice—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4.*—A conviction was quashed on the ground that there was a strong probability that if the evidence of certain witnesses for the prisoner who, when the case was heard, were absent through a misunderstanding, had been before the jury the prisoner would have been acquitted.

Magistrates should do nothing to discourage a prisoner from calling his witnesses at the hearing before them.

R. v. HENDRY, 25 T. L. R. 635—C. C. A.

98. *Fresh Evidence on Appeal—Identification after considerable Lapse of Time—Description of another Man given to Police soon after Offence.*

—A man (X.) obtained a horse by false pretences from J. on November 17th, 1906, at a horse fair. G. was arrested for the offence on August 5th, 1908. J. identified G. as being X.; but J.'s man, who had as good if not a better opportunity of seeing X. at the fair, was unable to identify G. as the man. There was no controversy as to G. being at the fair on November 17th, 1906. A handwriting expert stated that the cheque given by X. to J. at the fair and a cheque written by G. at the police court on his own request were written by the same person. For the defence, one witness said that G. was with him at the fair at the time the offence was committed, and he did not commit it; another witness said that a man, not G., had given him the horse to take away, and a third witness said that he saw a man not G., commit the offence. G. was convicted.

On appeal, a detective-sergeant was called by leave of the Court, who said that he thought the description of X. given to him about a fortnight after the offence was committed was that of another man—B. The description gave the height of X. as 5 feet 6 or 7 inches. G. was about 5 feet 3 inches in height—a very short man.

The Court quashed the conviction, having regard to the evidence given on appeal, but said that if there had only been the evidence given at the trial, the Court would not have allowed the appeal.

R. v. BETRIDGE, 73 J. P. 71—C. C. A.

99. *Mistake as to Character of Prosecutrix—Excessive Sentence—Reduction.*—A prisoner was sentenced to five years' penal servitude for stabbing a woman. It appeared that the judge who sentenced him thought the prosecutrix was a respectable woman living with her husband, and that D. had broken up her home. Inquiries having been made, it appeared that this woman was a prostitute, living with a man who was not her husband. The injuries, which were not serious, were inflicted by the appellant taking up a knife lying close to him in the midst of an altercation with the prosecutrix. The Court passed in substitution a sentence of eighteen months' imprisonment with hard labour.

R. v. DICKENSON, 73 J. P. 287—C. C. A.

## (f) Insanity.

100. *Conviction of Murder—Prisoner Defended at Request of Court—Defence of Insanity—No Witnesses Called—Possibility of Procuring Evidence of Insanity.*—A prisoner was convicted of murder, having been defended by counsel at the request of the court. The defence was insanity, but no witnesses were called on the prisoner's behalf. The prisoner applied for leave to appeal on the ground that if counsel or solicitor had been instructed earlier evidence of insanity might have been procured.

HELD—that a defence of insanity must be established before a jury, that the Court could not reverse a verdict by a jury on the possibility that other evidence might have been procured, and that the application must be dismissed.

R. v. ATHERLEY, [1909] W. N. 251—C. C. A.



## IV. Criminal Appeals—Continued.

## (g) Mistakes of Judges.

See also No. 43, *supra*.

**101. Appeal against Sentence—Evidence of Character—Confusion between Two Prisoners.**—W., aged sixteen, was convicted of stealing a lady's bag from her person. It appeared that he had been sentenced to fourteen days' imprisonment for embezzlement six months previously. W. was now sentenced to two years' imprisonment with hard labour, and he was recommended for treatment under the Borstal system. Before sentencing him, the judge said, "They say that they cannot do anything with you at home." It appeared that this remark had been made with reference to another person, D., and that the judge, in sentencing W., was under the impression that a bad character given to D. applied to W.

The Court reduced the sentence to six months' imprisonment with hard labour, to date from the conviction.

R. v. WHITEMAN, 73 J. P. 102—C. C. A.

**102. Omission—No Mention in Summing-up of Defence raised by Prisoner—No Miscarriage—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4, sub-s. 1.**—The prisoner was convicted of murder. At the trial the judge in his summing-up omitted all mention of the defence raised on behalf of the prisoner.

HELD—that as it could not be said on the facts that if the attention of the jury had been directed to the defence by the judge the result of the trial would have been and ought to have been different; the omission to refer to the evidence had not led to a miscarriage of justice.

In determining whether there has been a miscarriage of justice, the Court may consider what the appellant has said in his notice of appeal, although it may not be entitled to consider what is stated therein in determining whether the verdict is unreasonable or cannot be supported having regard to the evidence.

R. v. NICHOLLS, 73 J. P. 11; 25 T. L. R. 65—[C. C. A.]

**103. Omission to Warn Jury—Statement Affecting Prisoner—Prisoner's Explanation Interrupted—Danger of Miscarriage of Justice.**—A prisoner was indicted for larceny. A witness made some statement connecting the prisoner with a counterfeiting transaction. The prisoner attempted by cross-examination and by evidence to explain this reference, but on each occasion was stopped by the Chairman. The latter, however, did not explain to the jury that he had so stopped the prisoner merely because the matter introduced by the witness in question was quite irrelevant and ought to be disregarded.

HELD—that the incident might have influenced the verdict, and that the prisoner's appeal should be allowed.

R. v. LEE (72 J. P. 253; 24 T. L. R. 627; 52 Sol. Jo. 518) discussed.

R. v. WARNER, 73 J. P. 53; 25 T. L. R. 142—[C. C. A.]

**104. Evidence from Tainted Source—No Caution to Jury—Corroboration—Differentiation Between Two Prisoners.**—Conviction quashed on the ground that in the summing-up the jury were not cautioned that the evidence of a witness came from a tainted source and was uncorroborated, and on the further ground that there was no sufficient differentiation in the summing-up of the case against the prisoner from that against the prisoner indicted with him.

R. v. BEAUCHAMP, 73 J. P. 223; 25 T. L. R. 330 [—C. C. A.]

**105. Summing-up—Case for Prisoner.**—It is most important that the judge who is trying a case should put to the jury in his summing-up the case for the defence set up by or on behalf of the prisoner as well as the case for the prosecution. If that is not done there is sometimes a miscarriage of justice where the conviction is quashed—a miscarriage in that a man who would have been found guilty on a proper direction is discharged by the Court of Appeal.

R. v. KEATING, 73 J. P. N. C. 112—C. C. A.

**106. Misdirection—Evidence of Accomplice—Corroboration—Prisoner not Distinctly Informed of his Right to Give Evidence—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4.**—A conviction was quashed on the ground that the Chairman of Quarter Sessions had not sufficiently drawn the attention of the jury to the fact that the evidence for the prosecution was that of an accomplice insufficiently corroborated. A prisoner ought to be distinctly told that he has a right to give evidence on his own behalf.

R. v. WARREN, 73 J. P. 359; 25 T. L. R. 633—[C. C. A.]

**107. Misdirection—Mis-statement of Evidence—Question of Identity—Description on which Arrest Made.**—The appellant had been convicted of stealing. The question at the trial was as to the identity of the prisoner with the thief. K., the only witness as to identity, had given a description of the thief to a detective-sergeant, who arrested the prisoner on that description. It appeared from the judge's summing-up that K. had described the face of the thief to the sergeant, although, according to the evidence, he had not done so, except to describe him as "a fair man with a fair moustache." The judge also told the jury that they might leave out of consideration the question of whether the thief's clothes were light or brown, and simply confine their attention to the one fact—recognition by the face. According to the evidence, K. said that the thief wore a light suit, but dirty, and that he had so described the clothes to the sergeant. The sergeant said the description was not of a light suit, but of a brown dust-coat, grey trousers and light cap. He got another description elsewhere, which assisted him somewhat in corroborating K.'s description.

HELD—that the judge had misdirected the jury in mis-stating the effect of the evidence, and that the conviction must be quashed.

R. v. MASON, 73 J. P. 250—C. C. A.

#### IV. Criminal Appeals—Continued.

**108. Misdirection as to Law—No Leave Necessary—Misdirection not Substantial—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1).—**Misdirection is a question of law, and no leave to appeal on that ground is necessary.

Misdirection must depend upon the evidence given at the trial, and the lines upon which the case is conducted there.

The Court will not interfere where the misdirection is not substantial and results in no miscarriage of justice.

R. v. MEYER, 99 L. T. 203; 24 T. L. R. 620; 21 [Cox, C. C. 673—C. C. A.]

**109. Misdirection as to Law—“No Substantial Miscarriage of Justice”—Power of Court to Find Facts in order to Sustain Conviction—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1).—**By the proviso to sect. 4 (1) of the Criminal Appeal Act, 1907, the Court of Criminal Appeal, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal, if they consider that no substantial miscarriage of justice has actually occurred.

In a case where the jury were misdirected by a judge, but the Court of Criminal Appeal were of opinion, on consideration of the evidence given at the trial, that even had they been properly directed the jury would in all probability have convicted the prisoner, the Court nevertheless refused to act under this proviso, on the ground that they were unable to say certainly that the jury must have convicted.

The Court expressed their regret that they had no power to order a new trial.

R. v. DYSON, [1908] 2 K. B. 454; 72 J. P. 303; [99 L. T. 201; 24 T. L. R. 653; 21 Cox, C.C. 669—C. C. A.]

**110. Substantial Misdirection—Point Raised, Decided in Favour of Appellant—No Substantial Miscarriage of Justice—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1).—**The proviso to sect. 4 (1) of the Criminal Appeal Act, 1907, is:—“Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.”

The Court will not dismiss the appeal under this proviso in a case where there has been substantial misdirection, unless they can say that the jury, if properly directed, would have returned the same verdict.

R. v. DYSON (No. 109, *supra*) considered.

R. v. STODDART, 73 J. P. 348; 25 T. L. R. 612; [53 Sol. Jo. 578—C. C. A.]

**111. Defence not put before Jury—Disturbing Religious Meeting—Places of Religious Worship Act, 1812 (52 Geo. 3, c. 155), s. 12.—**Conviction quashed on the ground that the defence had not been properly put before the jury in the summing-up.

R. v. DINNICK, 26 T. L. R. 74—C. C. A.

**112. Mistakes in Law—Mistakes on Fact—Misdirection—“Miscarriage of Justice”—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1).—**The effect of sect. 4 (1) of the Criminal Appeal Act, 1907, and its proviso is that—

If there has been a wrong decision of any question of law the appellant has a right to have his appeal allowed unless the case can be brought within the proviso, *i.e.*, unless the Crown can show that on a right direction, if the point of law had been rightly decided, the jury must have come to the same conclusion that the prisoner was guilty.

If there has been a mistake of the judge on fact, or an omission by the judge to refer to some point in favour of the prisoner, there has been a miscarriage of justice, not only when the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when on the whole facts and with a correct direction the jury might fairly and reasonably have found the appellant not guilty. But if the Court thinks that on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no substantial miscarriage of justice within the meaning of the proviso, although the verdict actually given may have been due, to some extent, to the error of the judge on a question of fact.

R. v. COHEN AND BATEMAN, 73 J. P. 352—[C. C. A.]

#### (h) Practice.

**113. Appeal Dismissed—Sentence of Imprisonment in Second Division—Special Treatment pending Appeal—No Ground for Sentence Running from Conviction—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 14 (1) (3).—**An appellant to the Court of Criminal Appeal, who has been sentenced to imprisonment in the second division, receives special treatment pending the hearing of his appeal. Therefore, if his appeal is unsuccessful, the fact that he has been sentenced to the second division is in itself no ground for asking that his sentence should run from the date of conviction instead of from the date of the dismissal of the appeal.

R. v. GYLEE, 73 J. P. 72—C. C. A.

**114. Appeal on Question of Fact—Right of Prisoner to be Present—Prisoner Ill—Waiver by Counsel—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 11 (1).—**On an appeal involving questions of fact an appellant is entitled to be present, if he desires to be, and his counsel cannot waive the right, *e.g.*, when the prisoner is ill.

R. v. DUNLEAVEY, [1909] 1 K. B. 200; 78 L. J. [K. B. 359; 100 L. T. 240—C. C. A.]

**115. Notice of Application for Leave to Appeal on Facts—Amendment to Notice of Appeal on Law—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 7.—**Where an appellant gives notice of an application for leave to appeal against a conviction on grounds involving questions of fact in accordance with rules of Court, and within ten days of his conviction pursuant to sect. 7 of the Criminal

**IV. Criminal Appeals—Continued.**

Appeal Act, 1907, and it appears at the hearing of the application that there are grounds of law which could be argued in favour of the appellant, the Court may amend the notice of application for leave to appeal into a notice of appeal involving grounds of law. The Court so amended an application for leave to appeal against a conviction for murder, as by sect. 7 of the Criminal Appeal Act, 1907, they were prevented from extending the time for giving notice of appeal.

R. v. MEADE. 73 J. P. 192; 53 Sol. Jo. 378—  
[C. C. A.]

**116. Notice of Application for Leave to Appeal—Point Taken Not in Notice—Applicant Not giving Evidence at Trial—Evidence on Appeal.**—Where the appellants had been convicted of murder, and had drawn up their notices of application for leave to appeal by themselves, and without legal advice, the Court allowed counsel appearing on their behalf to take a point in their favour, although it had not been specified by the applicants in their notices.

Under special circumstances the Court of Criminal Appeal might hear evidence from applicants or appellants who had not given evidence at their trial.

R. v. MARK RUBENS; R. v. MORRIS RUBENS.  
[73 J. P. N. C. 240—C. C. A.]

**117. Leave to Appeal—Refusal by Single Judge—Reference to Full Court.** Applications to the Court of Criminal Appeal for leave to appeal are not, except in form, appeals from the judge who has refused to grant leave to appeal. Such a refusal in cases of real doubt is really a reference to the full Court.

R. v. GEORGE, *Times*, July 17th, 1909—C. C. A.

**118. Discharge of Jury—Power to Review Judge's Decision—Second Trial before Fresh Jury.**—The Court of Criminal Appeal has no power to review the decision of the judge at the trial of a prisoner as to whether a necessity has arisen for discharging the jury without giving a verdict, and for adjourning the case to be tried before a fresh jury. A jury should not be discharged merely in order to enable the prosecution to make out a stronger case against the prisoner.

R. v. LEWIS, [1909] W. N. 128; 78 L. J. K. B. [722; 100 L. T. 976; 73 J. P. 346; 25 T. L. R. 582—C. C. A.]

**119. Shorthand Note—Summing-up—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 16.**—The provisions of the Criminal Appeal Act, 1907, as to shorthand notes of proceedings being taken at the trial of a prisoner are directory only. The absence of a shorthand note does not in itself entitle an appellant to have the conviction set aside.

R. v. ELLIOTT, [1909] W. N. 118; 100 L. T. [976; 25 T. L. R. 572—C. C. A.]

**120. Shorthand Note—Summing-up—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 16.**—The shorthand notes of the proceedings at the trial of a prisoner which are required to be

taken by sect. 16 of the Criminal Appeal Act, 1907, should include a note of the summing-up.  
R. v. BENNETT, 25 T. L. R. 528—C. C. A.

**(i) Rogues and Vagabonds.**

See No. 66, *supra*.

**CROPS.**

See AGRICULTURE; LANDLORD AND TENANT.

**CROSSED CHEQUES.**

See BANKERS.

**CROWN.**

See CROWN PRACTICE; DEPENDENCIES AND COLONIES.

**CROWN DEBT.**

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**CROWN PRACTICE.**

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**I. CIVIL PROCEEDINGS AGAINST CROWN AND CROWN SERVANTS.**

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**II. CROWN RIGHTS.**

See also LUNATICS, No. 4.

**1. Action Involving Crown Rights—Removal to Revenue Side of King's Bench Division—Motion by Attorney-General—Damages for Injury to Oysters—Possession—No Title claimed to Oyster Bed.**—A motion by the Attorney-General to remove an action into the Revenue side of the King's Bench Division must be allowed where the Attorney-General suggests that the rights of the Crown may be involved and it does not appear that they cannot be so involved.

*Semble*, to enable the Court to refuse such a motion, it must appear that the rights of the Crown cannot possibly be involved.



**II. Crown Rights—Continued.**

A plaintiff, in his statement of claim, claimed damages for wrongful injury to his oysters lying in an oyster fishery, not claiming any title to the oyster bed, but relying on his possession of the oysters.

**HELD**—that he had no cause of action if he relied only on possession of the oysters, which could not be his property unless he showed possession either of the oyster bed or of a right of several fishery; that the rights of the Crown as claiming the foreshore might be affected; and that, therefore, the action must be removed on the Attorney-General's motion into the Revenue side of the King's Bench Division.

**ULMANN v. COWES HARBOUR COMMISSIONERS.** [1909] 2 K. B. 1; 78 L. J. K. B. 877; *sub nom.* **ATTORNEY-GENERAL v. MAYOR, ETC., OF NEWPORT, ETC.,** 100 L. T. 436—Channell, J.

**III. CERTIORARI.**

*See* MAGISTRATES, No. 8.

**IV. HABEAS CORPUS.**

2. *British Subject—Detention in British Protectorate—Competent Court in Protectorate—Jurisdiction of Court in England to Issue Writ of Habeas Corpus—Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37) —Habeas Corpus Act, 1862 (25 & 26 Vict. c. 20), s. 1.*—On a rule *nisi* calling upon the Secretary of State for the Colonies to show cause why a writ of *habeas corpus* should not issue to him calling upon him to bring before the Court the body of one Sekgomé, an imprisoned chief of a Bechuana-land tribe, and a British subject:—

**HELD**—that, as the Court of British Bechuana-land had power to inquire into the question of the detention of a British subject within the limits of the Protectorate, and as there was an existing competent Court in the Protectorate and the applicant could apply to that Court, with an appeal from that Court to the Privy Council, sect. 1 of the Habeas Corpus Act, 1862, was an answer to the application for a writ of *habeas corpus*, and that the rule should be discharged on that ground; and, further, that the Secretary of State had not the custody of the prisoner, and that therefore the writ would not run to him, as it should be directed to the custodian of the body, with notice of the writ to the Secretary of State.

**R. v. EARL OF CREWE,** 128 L. T. Jo. 173—  
[Div. Ct.]

**V. MANDAMUS.**

*See* ELECTIONS, No. 4; LOCAL GOVERNMENT, No. 7; MAGISTRATES, No. 3.

**CRUELTY TO ANIMALS.**

*See* ANIMALS.

**CRUELTY TO CHILDREN.**

*See* CRIMINAL LAW, Nos. 46, 47.

**CUSTOM OF THE COUNTRY.**

*See* AGRICULTURE.

**CUSTOMS AND USAGES.**

*See* AGENCY; BANKERS; BANKRUPTCY; BILLS OF EXCHANGE; BUILDERS; CARRIERS; STOCK EXCHANGE; TRADE.

**CUSTOMS DUTIES.**

*See* REVENUE.

**CY PRÈS DOCTRINE.**

*See* CHARITIES; WILLS.

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**DAMAGES.**

COL.

**I. CLASSIFICATION OF DAMAGES.**

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**I. CLASSIFICATION OF DAMAGES.**

(a) General or Nominal.

[No paragraphs in this vol. of the Digest.]

I. Classification of Damages—*Continued.*

(b) Penalty or Liquidated.

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(c) Consequential.

[No paragraphs in this vol. of the Digest.]

II. MEASURE OF DAMAGES.

[No paragraphs in this vol. of the Digest.]

III. WHEN DAMAGES CANNOT BE RECOVERED.

1. *Breach of Warranty on Sale of Food—Death caused by Eating Food—Pecuniary Damages for Loss of Wife—Loss of Services.*—The plaintiff sued the defendants for damages for breach of warranty on the sale of a tin of salmon which was unfit for human food and which caused the death of his wife. At the trial the jury found for the plaintiff, and assessed the damages sustained by him at a sum which included £200 for the loss of his wife's services.

HELD—that the plaintiff was entitled to recover those damages, as the rule laid down in *Baker v. Bolton* (1 Camp. 493), that in a civil Court the death of a human being cannot be complained of as an injury, only applies to cases where the death is an essential part of the cause of action, and does not apply to cases where there is a cause of action independently of the death.

JACKSON *v.* WATSON & SONS, [1909] 2 K. B. [193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454; 53 Sol. Jo. 447—C. A.

IV. ASSESSMENT.

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DANCING.

See THEATRES, ETC.

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DEATH DUTIES.

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See also DEPENDENCIES, No. 33.

I. ESTATE DUTY.

1. *Incidence of Duty—General Power of Appointment—Finance Act, 1894* (57 & 58 Vict.

*c.* 30), *s.* 9, *sub-s.* 1.]—Where a general power of appointment over a fund is exercised by will, the appointed fund passes to the executor "as such" within the meaning of sect. 9, sub-sect. 1, of the Finance Act, 1894, and the estate duty payable in respect thereof is not a charge on that fund but is payable out of the testator's personality.

*In re Treasure* ([1900] 2 Ch. 648; 69 L. J. Ch. 757; 83 L. T. 142; 48 W. R. 696; 16 T. L. R. 542—Kekewich, J.), *In re Power* ([1901] 2 Ch. 659; 70 L. J. Ch. 778; 85 L. T. 490; 49 W. R. 678; 17 T. L. R. 709—Byrne, J.), and *In re Dodson* ([1907] 1 Ch. 284; 76 L. J. Ch. 182; 96 L. T. 254—Warrington, J.) not followed. *In re Moore* ([1901] 1 Ch. 691; 70 L. J. Ch. 321; 49 W. R. 373—Buckley, J.), *In re Fearnside*s ([1903] 1 Ch. 250; 72 L. J. Ch. 200; 51 W. R. 186; 88 L. T. 57; 19 T. L. R. 104—Eady, J.), and *In re Orlebar* (*supra*) followed.

Decision of Parker, J. (77 L. J. Ch. 669; 24 T. L. R. 773; 99 L. T. 296; 52 Sol. Jo. 640), reversed.

IN RE HADLEY, JOHNSON *v.* HADLEY, [1909] [1 Ch. 20; 78 L. J. Ch. 254; 100 L. T. 54; 25 T. L. R. 44; 53 Sol. Jo. 46—C. A.

2. *Incidence of Duty—Settlement of Real Estate—Trust for Conversion—Failure of Object—Devise—Incidence of Estate Duty.*—Real estate was conveyed by a marriage settlement to trustees upon trust for the settlor for life and after his death upon trust for sale and to hold the proceeds of conversion upon certain trusts in favour of his wife and children, with an ultimate trust, in default of issue, to himself absolutely. The settlor's wife predeceased him and he died without issue, having devised the real estate to the defendant.

HELD—that as the real estate could not be sold until after the settlor's death, and as after his death there was no enforceable trust for sale—the property being "at home"—it devolved as realty and the devisee must bear the estate duty payable in respect of it.

Decision of Eve, J. ([1908] 1 Ch. 666; 77 L. J. Ch. 321; 98 L. T. 634; 24 T. L. R. 356) affirmed on other grounds.

IN RE LORD GRIMTHORPE, BECKETT *v.* [GRIMTHORPE, [1908] 2 Ch. 675; 78 L. J. Ch. 20; 99 L. T. 679; 25 T. L. R. 15—C. A.

3. *Incidence of Duty—Specific Appointments by Will of a "Clear" Amount or Value—Further Appointments of a "Like" Amount—Liability of Appointments so Worded to Pay Duties—Appointment of the Residue—Intention of an Appointor by Will.*—A testator was desirous of exercising a power of appointment given to him by his marriage settlement. During his lifetime he had already appointed sums to two of his children by deed, and by his will he disposed of the remaining trust funds by giving to certain of his children sums of the "clear" value of £ , to others sums of a "like" amount to those clear sums, to others sums of £ sterling, and to one

**I. Estate Duty—Continued.**

of his sons the residue. The effect of all the appointments, both by deed and will, was that, excluding the son appointed to residue, all the children took a nominally equal share under the settlement.

**HELD**—that, though the shares appointed were nominally of an equal amount, those expressed as being simply of £ sterling must be subject to the usual duty, whereas those worded as being of a “clear” amount or value, and those of a “like” amount to the “clear” sums, must be set aside without any deduction whatsoever, all duties and charges in connection with them being borne by the appointed residue.

**IN RE CONWELL'S TRUSTS, KINLOCH-COOKE**  
[*v. PUBLIC TRUSTEE*, [1909] W. N. 227; 101 L. T. 627—Joyce, J.]

**4. Incidence of Duty—Liability of Guaranteed Portions—“Cash Value”—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 8 (4), 14 (1).—**In a voluntary settlement the deceased had covenanted that certain funds available for portions for his children should be supplemented out of his estate so as to bring each portion up to £6,000, and in a further clause the portions were described as being of a “cash value” of £6,000.

**HELD**—that, as there was no covenant to pay the beneficiaries a “clear” sum, the case was within sect. 8, sub-sect. 4, and sect. 14, sub-sect. 1, of the Finance Act, 1894, and the duty must therefore be borne rateably by the persons interested in the fund.

**KEKEWICH v. KEKEWICH**, 128 L. T. Jo. 150—[Joyce, J.]

**5. Interest as Holder of an Office—Office of Trustee—Annuity by way of Remuneration—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2.]—**A settlor conveyed to trustees certain property upon trust to pay certain annuities, including an annual sum of £200, to each trustee while acting by way of remuneration for his service as trustee. Two of the trustees having died, the settlor by a power reserved under the settlement appointed two new trustees.

The Crown claimed, in addition to succession duty, estate duty and settlement estate duty on the principal value of the capital funds yielding the annual sum of £200.

**HELD**—that estate duty and settlement estate duty were not payable, inasmuch as the interest of the deceased trustees came within the proviso in sect. 2, sub-sect. 1 (b) of the Finance Act, 1894, as “only an interest as holder of an office”—viz., the office of trustee under the settlement.

**ATTORNEY-GENERAL v. EYRES AND OTHERS**, [1909] 1 K. B. 723; 78 L. J. K. B. 384; 100 L. T. 396; 25 T. L. R. 298—Channell, J.]

**6. Value of Property—Incumbrances Created bona fide “Wholly for the Deceased's Own Use and Benefit”—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7 (1) (a).—**The tenant for life of estates in Scotland executed deeds barring the

entail, and acquired the fee simple. He then gave charges on the estates to the nearest heir.

**HELD** (Lord Collins and Lord Shaw dissenting)—that those incumbrances, being created *bona fide*, were “wholly for the deceased's own use and benefit” within sect. 7 (1) (a) of the Finance Act, 1894, notwithstanding that the object of the transaction was to save the payment of estate duty upon the death of the tenant for life.

Decision of C. A. ([1908] 2 K. B. 729; 78 L. J. K. B. 1; 99 L. T. 534; 24 T. L. R. 758) affirmed.

**ATTORNEY-GENERAL v. DUKE OF RICHMOND, [GORDON, AND LENNOX]**, [1909] A. C. 466; 78 L. J. K. B. 998; 101 L. T. 241; 25 T. L. R. 775; 53 Sol. Jo. 713—H. L.]

**7. Foreigner Domiciled Abroad—Foreign Bonds Payable to Bearer—Bonds Lodged with Bank of England for Security—Property situate within the United Kingdom—Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 2 (2).—**Estate duty is payable in respect of foreign bonds of which the deceased, who was a foreigner domiciled abroad, was the holder at the time of his death, such bonds being situate in this country at the time of his death, and being marketable securities passing by mere delivery.

**Attorney-General v. Glendining** ((1904) 92 L. T. 87—Phillimore, J.) and **Attorney-General v. Bouwers** ((1838) 4 M. & W. 171) considered and approved.

Decision of C. A. ([1908] 1 K. B. 1022; 77 L. J. K. B. 565; 98 L. T. 602; 24 T. L. R. 445; 52 Sol. Jo. 378) affirmed.

**WINANS v. ATTORNEY-GENERAL**, [1909] W. N. [249; 26 T. L. R. 133; 54 Sol. Jo. 133—H. L.]

**II. LEGACY DUTY.**

**8. Direction to Pay all Duties—Trust for Payment of Legacy in futuro—Legacy Duty Payable out of Residue.]—**A testator directed his executors to pay all duties payable in respect of legacies or otherwise payable under his will, and directed them at any time to set apart and appropriate out of residue a sum as nearly as might be, but not exceeding £1,000,000, upon trust for a charity.

**HELD**—that legacy duty on the appropriated fund was payable out of residue.

Decision of Eve, J. (25 T. L. R. 543; 53 Sol. Jo. 503) affirmed.

**IN RE WHITELEY, WHITELEY v. BISHOP OF LONDON**, 26 T. L. R. 16; 101 L. T. 508—C. A.]

**III. PROBATE DUTY.**

[No paragraphs in this vol. of the Digest.]

**IV. SUCCESSION DUTY.**

See also I., *supra*.

**9. Entailed Land in Scotland—Propulsion of Fee by Disentail—Acceleration of Succession—Heir Liable for Succession Duty—Succession Duty Act, 1853 (16 & 17 Vict. c. 57), s. 15.]—**In



**IV. Succession Duty—Continued.**

1872 B., heir of entail in possession of Scotch estates entailed prior to 1848, executed a disposition of the entailed estates in favour of his son C., the heir apparent, who was under twenty-five. In 1875 C., having attained twenty-five, joined B. in obtaining from the Court a disentail.

B. died in 1898, and in 1906 the Inland Revenue claimed succession duty from C. in respect of his succession to the entailed estates.

HELD—that C. was liable.

Decision of Ct. of Sess. ([1907] S. C. 849) affirmed.

**EARL OF BUCHAN v. LORD ADVOCATE**, [1909] [A. C. 166; 78 L. J. P. C. 70; 100 L. T. 5; 25 T. L. R. 134; 53 Sol. Jo. 116; [1909] S. C. (H. L.) 8; 46 Sc. L. R. 91—H. L.]

**10. Person Entitled to Property upon the Death of any Person—Property Passing—New Trustee in Place of Deceased Trustee—Annuity—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2.**—A settlor conveyed to trustees certain property upon trust to pay certain annuities, including an annual sum of £200, to each trustee while acting by way of remuneration for his service. Two of the trustees having died, the settlor by a power reserved under the settlement appointed two new trustees in their place. The Crown claimed succession duty on the two annual sums of £200 to which the two new trustees succeeded after the deaths of the trustees in whose place they were appointed.

HELD—that succession duty was not payable, inasmuch as the annual sum of £200 to which each of the new trustees became entitled came to him upon his appointment and by reason of a vacancy in the trusteeship and not by reason of the death of any person within the meaning of sect. 2 of the Succession Duty Act, 1853.

**ATTORNEY-GENERAL v. EYRES AND OTHERS**, [1909] 1 K. B. 723; 78 L. J. K. B. 384; 100 L. T. 396; 25 T. L. R. 298—Channell, J.

**DEATH, PRESUMPTION OF.**

See EVIDENCE, No. 12.

**DEBENTURES.**

See COMPANIES.

**DEBTORS ACT, 1869.**

See BANKRUPTCY AND INSOLVENCY.

**DECEIT.**

See MISREPRESENTATION AND FRAUD.

**DECLARATIONS.**

See EVIDENCE.

**DEEDS AND OTHER INSTRUMENTS.**

See also CONTRACT; EQUITY; EVIDENCE; LANDLORD AND TENANT; MISREPRESENTATION AND FRAUD; POWERS; PRACTICE AND PROCEDURE.

**1. Construction—Trust for Founding College—Rule Prohibiting a Woman being Appointed Governor—Power to Alter Rules and Regulations—Fundamental Principles not to be Altered—Power to Appoint a Woman to be a Governor.**—By a deed poll which declared the rules and regulations by which a college, founded by the grantor of the deed, was to be carried on it was provided that “at no time shall a woman be appointed a governor or honorary governor” of the college. A later clause provided that a majority of three-fourths of the whole number of governors might after a certain period . . . revoke or alter all or any of the rules and regulations contained in the deed, but only in such way as should not alter the fundamental principles laid down in the deed.

HELD—on a construction of the deed as a whole, that, after the period mentioned, it was competent for a three-fourths majority of the governors so to alter the rules and regulations as to enable a woman to be a governor or honorary governor.

**IN RE HOLLOWAY'S TRUSTS, GREENWELL v. [RYAN]**, 26 T. L. R. 62; 54 Sol. Jo. 49—Eady, J.

**DEED OF ARRANGEMENT.**

See BANKRUPTCY AND INSOLVENCY.

**DEED OF ASSIGNMENT.**

See CHUSES IN ACTION.

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## II. AUSTRALIA.

See also NOTARIES, No. 1.

### (a) Commonwealth.

1. *Constitutional Powers of Commonwealth and of State of New South Wales—Leave to Appeal—Importation of Rails by State Government for State Railway—Customs Duties on Rails—Liability of State Government—Commonwealth of Australia Constitution Act, 1900* (63 & 64 Vict. c. 12), s. 74.]—The Government of New South Wales purchased in England in 1906 steel rails for the use of a State railway and paid for them out of moneys appropriated for that purpose by Acts of the State. The rails were consigned from England to the Secretary of Public Works. On their arrival at Sydney the collector of Customs claimed Customs duties on them. The High Court of Australia held that the doctrine that the Crown was not bound by a statute unless expressly mentioned had no application to the Crown as head of the State Governments, and that therefore the State Government was, for the purposes of Customs administration, in no better position than private persons. The Government of New South Wales applied for special leave to appeal.

HELD—that special leave could not be granted, as the case came within sect. 74 of the Commonwealth of Australia Constitution Act, 1900.

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* THE COLLECTOR OF CUSTOMS FOR NEW SOUTH WALES, [1909] A. C. 345; 78 L. J. P. C. 114; 100 L. T. 578; 25 T. L. R. 413 —P. C.

### (b) New South Wales.

See also TRESPASS, No. 2.

2. *Claim for Improvement Expenses—Land Situated in New South Wales—Right to Bring Action in English Court.*—An action is not maintainable in England by a colonial municipality to recover from an owner of property the amount of contributions for street improvements in such municipality leviable on such owner under a colonial statute.

SYDNEY MUNICIPAL COUNCIL *v.* BULL, [1909] [1 K. B. 7; 78 L. J. K. B. 45; 99 L. T. 805; 25 T. L. R. 6—Grantham, J.

3. *Crown Lands—“Holder of a Conditional Purchase”—Fulfilment of Conditions—Crown Lands Act, 1884* (48 Vict. No. 18), s. 7.]—The words “holder of a conditional purchase” in sect. 7 of the Crown Lands Act, 1884, mean a person who holds all the lands he purchased with the conditions originally attaching thereto still unfulfilled; they do not mean a person who has complied with all the conditions which originally attached to the purchase.

Decision of the Supreme Court of New South Wales (7 S. R., N.S.W., 538) reversed.

CHIPPENDALL *v.* WILLIAM LAIDLEY & CO., [1909] A. C. 199; 78 L. J. P. C. 61; 99 L. T. 787; 25 T. L. R. 38—P. C.

## II. Australia—Continued.

4. *Crown Lands—Occupation Licence—Relationship between Crown and Licensee—Agreement by Crown not to Disturb Licensee.*—The holder of an occupation licence under the Crown Lands Acts agreed with the Government that there should be a re-appraisal of the licence fees, but before the re-appraisal the Government demanded payment at the original rates, and the holder refusing to pay, the Government declined to renew his licence. Subsequently a fresh agreement was come to whereby, on the licensee paying at the old rate, the non-renewal was to be revoked and the licensee was to be permitted to quietly enjoy the property free from interference, disturbance, or eviction, an adjustment of the licence fees being eventually promised.

HELD—that the Crown could competently bind itself by such fresh agreement.

Decision of the High Court of Australia (5 C. L. R. 217) affirmed.

WILLIAMS v. O'KEEFE AND OTHERS, 26 T. L. R. [144—P. C.]

5. *Parliament—Legislative Assembly—Power to Make Standing Orders—"Orderly Conduct" of Assembly—Suspension of Member Charged with Criminal Offence—Constitution Act, 1902 (No. 32), s. 15.*—By sect. 15 (1) of the Constitution Act, 1902, "the Legislative Council and Legislative Assembly shall, as there may be occasion, prepare and adopt respectively standing rules and orders regulating (a) the orderly conduct of such Council and Assembly respectively. . . . (2) Such rules and orders shall by such Council and Assembly respectively be laid before the Governor, and being by him approved shall become binding and of force." The House itself is the sole judge whether an "occasion" has arisen for the adoption of a standing order regulating the orderly conduct of the Assembly, and no Court of law can question the validity of a standing order duly passed and approved which, in the opinion of the House, is required by the exigency of the occasion, unless upon a fair view of all the circumstances it is apparent that it does not relate to the orderly conduct of the Assembly.

The plaintiff, who was a member of the Legislative Assembly, and who had been Secretary for Lands, was found by a Royal Commission to have been guilty of misconduct in his office, and criminal proceedings were pending against him. A resolution was moved in the Legislative Assembly that the House should forthwith proceed to consider the report of the Royal Commission, which contained findings of misconduct against the plaintiff. The Speaker ruled that the House could not proceed with the resolution, as the plaintiff might thereby be prejudiced in the criminal proceedings. The House thereupon passed a standing order that "whenever it shall have been ruled or decided (whether before or after the approval of this standing order) that the House may not proceed on a matter which has been initiated in the House affecting the alleged misconduct of a member, because thereby the said member may be prejudiced in a criminal

trial then pending on charges founded on such misconduct, the House may suspend such member from the service of the House until the verdict of the jury has been returned or until it is further ordered." This standing order was approved by the Governor. The House then passed a resolution suspending the plaintiff from the service of the House until the verdict in the criminal trial or until further order.

HELD—that the order was enforceable against the plaintiff.

Decision of the Supreme Court of New South Wales (7 S. R., N.S.W., 126) reversed.

HARNETT v. CRICK, [1908] A. C. 470; 78 L. J. [P. C. 38; 99 L. T. 601; 24 T. L. R. 869—P. C.]

6. *Civil Service—Pension—Civil Service Act (N.S.W.) (48 Vict. No. 24), s. 46—Public Service Act (N.S.W.) (No. 25 of 1895).*—The plaintiff had been a member of the Civil Service of New South Wales, but his services were dispensed with as from June 30th, 1896, by the Public Service Board established under the Public Service Act, 1895. At the date of his retirement the plaintiff, who was then fifty-eight years of age and had forty-one years of service to his credit, received a refund of his contributions to the superannuation account established by the Public Service Act, 1884, and a gratuity as provided by sect. 60, sub-sect. 1, of the Public Service Act, 1895. He subsequently received in addition a pension calculated in accordance with the provisions of the Public Service (Superannuation) Act, 1899. In 1905 he claimed an increased pension under sect. 46 of the Act of 1884, on the ground that his services had been in fact dispensed with in consequence of the abolition of his office as accountant and cashier in bankruptcy. The office which the plaintiff had filled was not filled up on his retirement by the appointment of a successor with the same title, the duties being performed by a person who was graded as "clerk," and was officially so described.

HELD—that, even assuming the change of designation amounted to the abolition of the plaintiff's office within sect. 46 of the Act of 1884, it was not competent for the plaintiff, having regard to the express provisions of the Act of 1895, to fall back on the Act of 1884, and that his action consequently failed.

Decision of the High Court of Australia (7 S. R., N.S.W., 418; Vol. 4, Part I., Commonwealth L. R. 694) reversed.

WILLIAMS v. CURATOR OF INTESTATE ESTATES, [1909] A. C. 353; 78 L. J. P. C. 97; 100 L. T. 667; 25 T. L. R. 495—P. C.]

7. *Sunday Trading—Sale at Railway Refreshment Room—Police Offences Act, 1901 (N.S.W.), s. 61.*—The lessee of railway refreshment rooms in New South Wales, who by his lease has to keep open those rooms at all times required by the Railway Commissioners, and to supply refreshments on demand to all persons arriving or departing by train at any time during the day or night, commits an offence against sect. 61



## II. Australia—Continued.

of the Police Offences Act, 1901, of New South Wales, if he sells refreshments on Sunday to a person other than a person arriving or departing by train.

Whether the Sunday trading clauses in the Police Offences Act, 1901, are binding upon the Crown, *quære*.

Decision of the Supreme Court of New South Wales (8 N.S.W., S.R., 272) reversed.

KELLY v. HART, 26 T. L. R. 121—P.C.

### (c) Queensland.

8. *Rates—Local Authority with Area Divided into Wards—Expenditure out of General Rates on Works in one Ward—Validity—Local Authorities (Queensland) Act, 1902* (1902, No. 19), ss. 192, 265.]

HELD—that the respondents were not entitled to expend moneys received by them in respect of general rates levied upon the rateable lands in one division or ward of their area upon works constructed in another division or ward, in the absence of the resolution and direction prescribed by sect. 265 of the Local Authorities Act, 1902.

Decision of the High Court of Australia (5 C. L. R. 695) reversed.

ATTORNEY-GENERAL FOR QUEENSLAND (AT [THE RELATION OF JAMES THOMAS ISLES] v. THE CITY COUNCIL OF BRISBANE, [1909] A. C. 582; 78 L. J. P. C. 139; 101 L. T. 163; 25 T. L. R. 828—P. C.

### (d) South Australia.

9. *Appeal upon Costs—Licensing Acts—Local Option Poll—Irregularity—Prohibition—Costs against Justices—Local Option Act, 1905* (5 Edw. 7, No. 897).]—Upon an application for a prohibition against licensing justices to prevent them from further proceeding to determine the question of the renewal of publicans' licences upon the ground that there had been irregularities in procedure under the Local Option Act, 1905, the justices appeared by counsel against the application. The Supreme Court of South Australia granted the prohibition, but refused to give costs against the justices.

HELD—that, as the Court had exercised its discretion by refusing to give costs, no appeal lay.

RIEKEN v. YORKE PENINSULA LICENSING [JUSTICES—KEAM v. ADELAIDE LICENSING JUSTICES, [1908] A. C. 454; 78 L. J. P. C. 45; 99 L. T. 529; 24 T. L. R. 821—P. C.

### (e) Victoria.

[No paragraphs in this vol. of the Digest.]

### (f) Western Australia.

[No paragraphs in this vol. of the Digest.]

## III. BRITISH SOUTH AFRICA.

### (a) Bechuanaland.

See CROWN PRACTICE. No. 2.

### (b) Cape Colony.

10. *Will—Construction—Directions as to Proportion of Division—Clause Varying Proportion—Applicability of Clause.*]—A testator was entitled to one-half share in a business carried on by him in partnership with his brother H., and he had separate property besides. H. survived the testator, and continued to carry on the business during his life on his own sole account as he was authorised to do by the will. In the events which had happened, he had a life interest in the entire residue of the testator's estate. By clause 20 of the will the testator directed that one-fourth of the residue of his estate should go to his brother H., and the remaining three-fourths to the other heirs. Clause 22 provided that, if H., whilst carrying on the business, received payment of any mortgage bonds belonging to the partnership business, H. should at once pay over to the other heirs one-fourth part of the proceeds.

By clause 23, in order to avoid all disputes and differences, the testator directed that an inventory should be taken both of his private estate and also of the partnership assets, and that his heirs other than H. should be paid out their three-fourths share in his private estate and one-fourth share of the partnership assets on the valuations contained in the inventory, "whenever such payment may be made to them, and they shall not be entitled to claim any profits or gains made by the said Henry Rudolph Stephan should he continue and carry on the business, nor on the other hand shall such heirs be responsible for any losses." Among the assets of the partnership estate at the death of H. was a bond for the sum of £2,000. The bond was valued in the inventory at that sum. It was paid off in full after H.'s death.

HELD—that the principle of division which was laid down clearly in clause 20 must apply in all cases not specially mentioned in clause 23, and that H.'s representatives were entitled to £1,250 only, being H.'s half-share as partner and one-fourth of the testator's half-share under the will.

Decision of the Supreme Court of the Cape of Good Hope affirmed.

STEPHAN v. CAPE TOWN BOARD OF EXECUTORS [1909] A. C. 347; 78 L. J. P. C. 121; 100 L. T. 664—P. C.

### (c) Natal.

[No paragraphs in this vol. of the Digest.]

### (d) Transvaal.

11. *Purchase and Sale of Land—Consideration—Shares in Syndicate to be Formed for Purpose of "Development"—Insufficient Working Capital—Ambiguity—Specific Performance.*]—The Court refused to enforce specific performance of a contract for the sale of a farm in consideration of certain shares in a syndicate to be formed for the purpose of developing the farm as a mining property, the vendor refusing to transfer the farm for shares in the syndicate upon the ground that the working capital of the syndicate was not sufficient for the purpose. The Court was of opinion that the contract was too ambiguous to be enforced, there being nothing

### III. British South Africa—Continued.

to define the extent of operations or amount of working capital contemplated by the parties.

Decision of the Supreme Court of the Transvaal ([1907] T. S. 508) affirmed.

DOUGLAS v. BAYNES, [1908] A. C. 477; 78 L. J. P. C. 13; 99 L. T. 599; 24 T. L. R. 896—P. C.

**12. Roman-Dutch Law—Wife Surety for her Husband—Mortgage of Land in Transvaal—Lex Situs.**—The defendant's husband being indebted to the plaintiffs for advances, the defendant, by an agreement dated November 23rd, 1903, agreed to give the plaintiffs as security two mortgage bonds to be charged upon certain real property in Johannesburg registered in her name. The plaintiffs subsequently made further advances to the defendant's husband. On December 4th, 1906, the defendant appointed the plaintiffs' manager to be her attorney to mortgage or transfer the property to the plaintiffs. In an action by the plaintiffs for specific performance of the agreement of November, 1903:—

**HELD**—that the defendant's capacity to contract was governed by the *lex situs*; that by that law the defendant, as a married woman, was incapacitated from entering into such a contract unless, after explicit explanation of the real nature of her rights, she formally renounced them, and that as the defendant had not formally renounced her rights the agreement of November, 1903, was void, and the plaintiffs' action therefore failed.

**HELD FURTHER**—that the agreement of November, 1903, and the document of December, 1906, must be delivered up to the defendant.

Decision of Eve, J. ([1909] W. N. 50; 100 L. T. 295; 25 T. L. R. 285; 53 Sol. Jo. 268) affirmed.

THE BANK OF AFRICA, LD. v. COHEN, [1909] 2 Ch. 129; 78 L. J. Ch. 767; 100 L. T. 916; 25 T. L. R. 625—C. A.

### IV. CANADA.

See also TRADE AND TRADE UNIONS, No. 7.

#### (a) Dominion Generally.

**13. Law of Canada—Dominion and Provincial Legislation—Conflict.**—Where a field of legislation is within the competence both of the Dominion Parliament and a Provincial Legislature, and both have legislated, in the case of a conflict the enactment of the Dominion Parliament must prevail.

Therefore, where a company incorporated by a statute of a Provincial Legislature has under their Act the exclusive right of supplying electricity within a certain radius, that company is not entitled to an injunction to restrain a company incorporated by an Act of the Dominion Parliament, with unlimited powers, from supplying electricity within the radius.

Decision of the Court of King's Bench (appeal side) for Lower Canada, in the Province of Quebec, affirmed.

LA COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS v. CONTINENTAL HEAT AND LIGHT CO., [1909] A. C. 194; 78 L. J. P. C. 60; 99 L. T. 786—P. C.

**14. Legislative Powers—Court of Appeal for Canada—Power of Provincial Legislature to Limit Appeals—Revised Statutes of Canada, 1906, c. 139, ss. 35, 36—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 92, 101.**—A Provincial Legislature has no power to limit the right of appeal from the Provincial Courts to the Supreme Court of Canada, which is conferred by sect. 36 of c. 139 of the Revised Statutes of Canada, 1906, even in matters which are, by sect. 92 of the British North America Act, 1867, within the exclusive jurisdiction of the Provincial Legislature.

THE CROWN GRAIN CO., LD., AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA v. DAY AND THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, [1908] A. C. 504; 78 L. J. P. C. 19; 99 L. T. 746; 24 T. L. R. 913—P. C.

**15. Will—Construction—Gift to Children—Conditions in Restraint of Alienation—Enjoyment of Usufruct—Grandchildren Conditionally Substituted—No Right of Accretion—Quebec Civil Code.**—A Canadian directed by his will that his estates should be divided into equal shares amongst his seven children, who were to have the usufruct and enjoyment of all his property. On the decease of any child such child's children were to have the full proprietary right and interest therein. To his grandchildren thus substituted for his children he gave the right to use, enjoy, or dispose of the same as it might seem good to them, instituting them for this purpose his universal legatees.

He prescribed three conditions: (1) that the property bequeathed to his children should not be assignable, or capable of being seized by their creditors; (2) that it should not be sold or alienated under any pretext, but should pass "*en nature*" to his grandchildren; (3) that the grandchildren should not alienate the share of the property which should belong in usufruct to their respective fathers or mothers before the said usufruct had come to an end.

**HELD**—that each child was entitled to his specific share (which had been ascertained by a statutory partition) as sole proprietor subject to the condition of handing it over to his children at his death; and that there was no right of accretion amongst either the testator's children or grandchildren.

PRÉVOST v. PRÉVOST, [1908] A. C. 541; 78 L. J. P. C. 7; 99 L. T. 748; 24 T. L. R. 892—P. C.

**16. Railways—Obligation to run Train with Third-class Carriages—Fares—Grand Trunk Railway Act, 1852 (16 Vict. c. 37), s. 3; Railway Acts, 1903 (3 Edw. 7, c. 58) and 1906 (6 Edw. 7, c. 58).**—Sect. 3 of the Grand Trunk Railway Act, 1852, which requires that the fare for each third-class passenger by any train on the railway of the company shall not exceed one penny per mile, and that at least one train having in it third-class carriages shall run every day throughout the length of the line between Toronto and Montreal, has not been impliedly



## IV. Canada—Continued.

repealed by the provisions of the Railway Act, 1906.

THE GRAND TRUNK RY. CO. OF CANADA *v.* [ROBERTSON, [1909] A. C. 325; 78 L. J. P. C. 84; 100 L. T. 250; 25 T. L. R. 344—P. C.]

17. *Damage by Fire from Railway—Map Required by Statute—Conclusive against Railway Company—Map not Forthcoming at Trial—Admissibility on Appeal—Railway Acts of Canada.*—In an action for damages by fire caused by the defendant railway company's negligence, the defendants' liability largely depended on the question whether a certain spot, where the fire started, was within the defendants' right of way. The railway company were by statute obliged to make and file plans of the land on which their railway was constructed, but at the trial they maintained that no map or plan of the railway at the spot in question had ever been made or at least filed. The jury decided the point against the railway company. Before the hearing of the appeal to the Supreme Court of Canada, the map in question was discovered. The Supreme Court, however, refused to admit it in evidence and ordered a new trial. The map, if admitted, would have proved that the fire originated in the defendants' right of way.

HELD—that whether or not the Supreme Court of Canada was precluded by law from admitting the map, the Judicial Committee were not so precluded, and that the decision of the Supreme Court must be reversed.

BLUE AND DESCHAMPS *v.* RED MOUNTAIN RY. [Co., [1909] A. C. 361; 78 L. J. P. C. 107—P. C.]

18. *Exchequer Court of Canada in Admiralty—Jurisdiction—Claim under Mortgage on Ship—Action in rem—Pleading—Abatement of Contract Price.*—In an action *in rem* brought in the Exchequer Court of Canada in Admiralty by the builders of a ship to enforce a mortgage thereon given to them on account of the contract price for its construction, the owners of the ship are not entitled by way of defence to set off a claim for unliquidated damages against the mortgagees for alleged breach of contract relating to the building of the ship.

Decision of the Supreme Court of Canada (40 Can. S. C. R. 418) reversed.

BOW, McLACHLAN & CO., LD. *v.* SHIP CAMOSEN [AND UNION STEAMSHIP CO. OF BRITISH COLUMBIA, LD., [1909] A. C. 597; 101 L. T. 167; 25 T. L. R. 833—P. C.]

19. *Shipping—Pilotage Dues—Exemption—Ship "Propelled Wholly or in Part by Steam"—"Navigates"—Barge Towed by Steam Tug—Canadian Pilotage Act (Revised Statutes of Canada, 1886, c. 80), ss. 58, 59.*—By the Canadian Pilotage Act, s. 58, "every ship which navigates within" certain pilotage districts, "shall pay pilotage dues, unless . . . she is exempted under the provisions of this Act from payment of such dues." By sect. 59, "the

following ships . . . shall be exempted from the compulsory payment of pilotage dues. . . . Ships propelled wholly or in part by steam."

HELD—that a barge rigged as a schooner, having masts with gaffs used as derricks for the discharge of cargo, and small sails used to steady her in a strong breeze, which could not be navigated as a sailing vessel in the ordinary way, but was intended to be, and was in fact always, towed from port to port by a tug, was a "ship" which "navigated" within the meaning of the Act, and was not "propelled wholly or in part by steam" so as to be exempt from the payment of pilotage dues when navigating within a pilotage district.

Judgment of the Supreme Court of Canada reversed.

The *Grandee* (8 Exch. Rep. Canada, 54, 79) disapproved.

ST. JOHN PILOT COMMISSIONERS *v.* CUMBER- [LAND RY. AND COAL CO., 101 L. T. 498; 26 T. L. R. 52—P. C.]

20. *Shipping—Collision—Ships entering Lock—Canadian Canal Regulations, s. 19 (d).*—The Canadian Canal Regulations provide by sect. 19, sub-sect. (d): "When several boats or vessels are lying by or are waiting to enter any lock or canal, they shall lie in single tier, and at a distance of not less than 300 feet from such lock or entrance, . . . and each boat or vessel for the purpose of passing through shall advance in the order in which it may be lying in such tier, except in the case of vessels of the first class to which priority of passage is granted."

The *H.*, a steamship belonging to the respondent, was about to enter a lock on a canal when the *P.*, a steamship of the first class, belonging to the appellants, came up from behind and claimed a right to priority of passage. The *H.* went astern to make room for the *P.* to pass into the lock first, and lay up by the wing wall of the lock. Afterwards a collision occurred between the two vessels owing to the fault of the *P.*

HELD—that the *H.* was not obliged under the regulations to go back to a distance of 300 feet from the entrance to the lock, and was not to be held to blame for the collision.

RICHELIEU AND ONTARIO NAVIGATION CO. *v.* [TAYLOR, 101 L. T. 504—P. C.]

## (b) British Columbia.

21. *Petition of Right—Refusal of Provincial Secretary to Present Petition to Lieutenant-Governor—Subsequent Presentation of Petition—Damages—Crown Procedure Act (Revised Statutes of British Columbia, 1897, c. 57), s. 4.*—The Chief Commissioner of Lands and Works of British Columbia having refused to renew a special licence for cutting and carrying away timber on a tract of land, the licensee prepared a petition of right setting forth the application and refusal, and left it with the Provincial Secretary of British Columbia for submission to the Lieutenant-Governor for his *fiat*, in accordance with sect. 4 of the Crown Procedure



IV. Canada—*Continued.*

Act of British Columbia. The Provincial Secretary in a letter to the suppliant's solicitors stated that he declined to submit the petition to the Lieutenant-Governor. Thereupon the suppliant brought an action against the Provincial Secretary claiming damages for refusing to submit the petition in accordance with the Act. Before the defence was delivered the petition was submitted to the Lieutenant-Governor, who refused his *fiat*. The judge at the trial having held that there was no evidence to go to the jury :

HELD—that a cause of action arose upon the refusal to submit the petition to the Lieutenant-Governor, and it was for the jury to say whether any and, if so, what damages flowed therefrom.

FULTON v. NORTON, [1908] A. C. 451; 78 L. J. [P. C. 29; 99 L. T. 455; 24 T. L. R. 794—P. C.]

22. *Divorce—Power of Supreme Court to grant Divorce—English Law Act (Revised Statutes of British Columbia, c. 115), s. 2.*—The Supreme Court of British Columbia has power to grant a decree of divorce between persons domiciled in British Columbia in respect of matrimonial offences committed there. The jurisdiction may be exercised by a single judge of the Court.

WATTS AND THE ATTORNEY-GENERAL FOR [BRITISH COLUMBIA v. WATTS, [1908] A. C. 573; 77 L. J. P. C. 121; 99 L. T. 744; 24 T. L. R. 911—P. C.]

## (c) Lower Canada.

[No paragraphs in this vol. of the Digest.]

## (d) Manitoba.

[No paragraphs in this vol. of the Digest.]

## (e) Ontario.

See also CONTRACT, No. 4; TRADE AND TRADE UNIONS, No. 19.

23. *Revenue—Succession Duty—Property Locally Situate Outside the Province—"Direct Taxation Within the Province"*—*Succession Duty Act (Rev. Stat. Ont., c. 24), s. 4—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 92, sub-s. 2.*—The Legislature of the Province of Ontario has no power to impose a tax, such as succession duty, on movable property locally situate outside the Province.

Decisions of the C. A. for Ontario (15 Ont. L. R. 416) reversed.

WOODRUFF AND OTHERS v. THE ATTORNEY-GENERAL FOR ONTARIO *et c. contra*, [1908] A. C. 508; 78 L. J. P. C. 10; 99 L. T. 750; 24 T. L. R. 912—P. C.]

24. *Sale of Land for Arrears of Taxes—Irrregularities in Sale—Right to Redeem—Consolidated Assessment Act, 1892—Assessment Act (Rev. Stat. Ont., 1897, c. 224)—Toronto Act (3 Edw. 7, c. 86), s. 8—Municipal Taxation Act (4 Edw. 7, c. 23), s. 148.*—Where land is sold under the Assessment Acts of Ontario for arrears of taxes due upon it, an insufficient or inaccurate description

of the land in the assessment roll is a "failure to comply with the requirements of the statute" within sect. 8 of the Toronto Act (3 Edw. 7, c. 86), and is cured by it.

An omission to give proper notice of the sale is "a failure or omission on the part of an official of the said city" within the same section, and is cured by it.

The Municipal Taxation Act (4 Edw. 7, c. 23) regulates the amount to be paid to redeem when a municipality purchases land for the taxes due upon it, but does not in any way alter the period for redemption.

Judgment of the Court below reversed.

TORONTO CORPORATION v. RUSSELL, [1908] [A. C. 493; 78 L. J. P. C. 1; 99 L. T. 738; 24 T. L. R. 908—P. C.]

25. *Negligence—Dangerous Article—Duty to take Precautions—Gas Explosion.*—In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that an accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. On the other hand, if the proximate cause of the accident is not the negligence of the defendant but the conscious act of volition of another, the defendant is not liable, for against such conscious act of volition no precaution can really avail.

DOMINION NATURAL GAS CO., LD. v. COLLINS, [SAME v. PERKINS AND OTHERS, [1909] A. C. 640; 101 L. T. 359; 25 T. L. R. 831—P. C.]

26. *Arbitration under Railway Act—Appeal from Award—Choice of Forum—Canada Railway Act, 1903, s. 168.*—In Ontario an appeal from an award by arbitrators under the Canada Railway Act, 1903, lies either to the High Court of Justice for Ontario or to the Court of Appeal for Ontario, but if the appeal is taken to the High Court no appeal lies from its decision to the Court of Appeal or to the Supreme Court of Canada.

THE JAMES BAY RY. CO. v. ARMSTRONG, [1909] [A. C. 624; 101 L. T. 362; 26 T. L. R. 1—P. C.]

## (f) Quebec.

[No paragraphs in this vol. of the Digest.]

## V. CEYLON.

27. *Marriage between Persons who had Lived in Adultery—Validity of Testamentary Gifts by One Party to the Other.*—The law of Ceylon does not prohibit the marriage of those who have previously lived in adultery, and bequests by either party to such a marriage to the other party are valid.

RABOT AND ANOTHER v. DE SILVA AND [OTHERS, [1909] A. C. 376; 78 L. J. P. C. 73; 100 L. T. 242; 25 T. L. R. 332—P. C.]

## V. Ceylon—Continued.

**28. Roman-Dutch Law—Malicious Prosecution—Malice—Burden of Proof.**—A prosecution instituted without malice and with reasonable and probable cause cannot, under the Roman-Dutch law, be held to amount to an act of aggression. An *animus injuriæ* in the prosecutor cannot therefore be inferred from the mere fact that the prosecution has failed and the accused been acquitted. The burden of proving the existence of malice rests under the Roman-Dutch law, as under English law, on the plaintiff in such an action.

COREA v. PEIRIS, [1909] A. C. 549; 100 L. T. 790; 25 T. L. R. 631—P. C.

## VI. CHANNEL ISLANDS.

[No paragraphs in this vol. of the Digest.]

## VII. GIBRALTAR.

[No paragraphs in this vol. of the Digest.]

## VIII. HONG KONG.

**29. Perjury—Summary Committal—No Opportunity of giving Reasons against Summary Procedure—Hong Kong Ordinance (No. 3 of 1873, s. 31).**—The appellants were, under the provisions of sect. 31 of the Hong Kong Ordinance, No. 3 of 1873, summarily committed to prison for corrupt perjury in open Court.

HELD—that the committal was bad, inasmuch as no opportunity had been given the appellants for explanation or correction of any misapprehension as to what had been said or meant by them in the evidence they had given.

CHANG HANG KIU v. PIGGOTT, IN RE LAI [HING FIRM, [1909] A. C. 312; 78 L. J. P. C. 89; 100 L. T. 310; 25 T. L. R. 381—P. C.

## IX. JAMAICA.

[No paragraphs in this vol. of the Digest.]

## IXB. MALTA.

**30. Will—Fideicommissum and Primogenitura—Will giving Power to Legatee to create Primogenitura—Legatee imposing Condition on Holders of Primogenitura to adopt Name of Testator—Power to impose Condition.**]

HELD—that a will which created a *fideicommissum* in certain immovable property and which gave the legatee power to create primogenitures, gave the legatee no power, when creating the primogenitures, to impose the condition that any holder of a *primogenitura* should be bound, on penalty of forfeiture, to add the surname of the original testator to his own name.

STRICKLAND v. STRICKLAND, [1908] A. C. 551; [78 L. J. P. C. 21; 99 L. T. 448; 24 T. L. R. 791—P. C.

## IXC. MAURITIUS.

**31. Mahomedan Law—Administration of Wakf Estate—Rights of Wakifs—Practice of Court—Scheme of Administration—Charter of Incorporation superseded.**—From time to time from 1852 onwards certain wakf properties in Mauritius were purchased "for the whole Mahomedan congregation of the island," consisting of Indian immi-

grants from Cutch, Hallal, and Surat, and their descendants, and were dedicated by the deeds inalienably for the purpose of a mosque. The overwhelming majority of the congregation belonged to the Cutchee class, and in 1877 the deeds of properties bought declared that such properties were bought on behalf of the Cutchees, a committee of whom were to administer them and all the other properties belonging to the mosque. Later purchases were expressed to be made, some on behalf of the Cutchees, others on behalf of the congregation. In 1903 two deeds were executed by a body of Cutchees by which they formed themselves into a society afterwards incorporated under Ordinance 22 of 1874 for certain pious and charitable purposes, declared that they brought into the society in full ownership all the said purchased properties, with extensive powers of selling and letting the same, other than the mosque and its accessories, of which latter they reserved to themselves the exclusive management.

In actions brought by the Hallaye and Soortee classes the Court below ordered the deeds to be set aside so far as they gave exclusive administration as of right to the Cutchees, and substituted a scheme giving to the plaintiffs a share in the administration, but subject to future modifications. On appeal—

HELD—that as the deeds could not be maintained consistently with the rights of the plaintiffs they should be set aside *in toto*, and that as the charter of incorporation in consequence became inoperative, the amending scheme must also be set aside.

IBRAHIM ESMAEL v. ABDOOL CARRIM PEER-  
[MAMODE; IBRAHIM ESMAEL v. ABOO BAKAR  
MAMODE TAHER, [1908] A. C. 526; L. R. 35  
Ind. App. 157; 99 L. T. 445; 24 T. L. R.  
790—P. C.

## X. NEWFOUNDLAND.

**32. Street Railway—Removal of Snow from Track—Levelling Snow on Each Side of Track—Depth Prescribed by City Engineer—St. John's Street Railway Act, 1896 (60 Vict. c. 20), s. 42.**]

—By the St. John's Street Railway Act, 1896, a company was authorised to make and operate a street railway in St. John's, and by sect. 42 it might remove snow and ice from the railway track so as to enable it to operate its cars, provided that, in case such snow or ice should be removed from its track or disturbed or thrown out by the plough, leveller, or tools of the company; and "it shall be the duty of the company within forty-eight hours to level the said snow or ice on each side of the track to a uniform depth, to be determined by the engineer of the council, and so as not to impede the ordinary traffic of the street." The company removed snow from the railway track, and the engineer of the council determined that eight inches was the necessary depth for the snow on the sides of the track, so as not to impede the ordinary traffic of the street. The company could not comply with the engineer's requirements unless it removed some snow out of the street which it refused to do. The council thereupon removed the snow, and claimed to recover the expense from the company.



## X. Newfoundland—Continued.

HELD—that it was a condition of the licence to break up the snow in the streets and to remove it from the railway track that the company should level the snow on each side of the track to a uniform depth to be determined by the engineer of the council, even though this necessitated the removal of all or some of the snow from the streets, and that therefore the company was liable for the expense of removing the snow.

SHEA *v.* REID-NEWFOUNDLAND COMPANY, [1908] A. C. 520; 78 L. J. P. C. 43; 99 L. T. 743; 24 T. L. R. 879—P. C.

## XI. NEW ZEALAND.

33. *Death Duties—New Zealand Deceased Persons' Estates Duties Act, 1881, s. 35—Stamp—Deed of Gift—New Zealand Stamp Acts.*—By sect. 35 of the New Zealand Deceased Persons' Estates Duties Act, 1881, "it shall be lawful for any Court of competent jurisdiction . . . to declare any disposition of real or personal property to have been made for the purpose of evading the duty imposed by this Act, and also to declare that duty is payable on the property comprised in such disposition. . . ."

HELD—that if the transaction in question is real and *bona fide*, the intention to avoid the payment of death duties is not enough to bring it within the section.

A deceased person gave to his daughter a general power of attorney under which she with his consent received moneys due to him on mortgages and lent the money again to the same mortgagor in her own name.

HELD—that there was no gift to the daughter by any document, and therefore no stamp duty was payable as on a deed of gift.

Judgment of the Court of Appeal for New Zealand affirmed.

MINISTER OF STAMPS *v.* TOWNEND, [1909] [A. C. 633; 101 L. T. 354—P. C.]

## XII. SHANGHAI.

34. *Jurisdiction—Forfeiture of Ship—Unauthorised Use of British Flag—Condemnation by Foreign Court—Merchant Shipping Acts, 1894 (57 & 58 Vict. c. 60), ss. 69, 76; and 1906 (6 Edw. 7, c. 48), s. 51.*—Under sect. 76 of the Merchant Shipping Act, 1894, only Courts which are within the dominions of the Crown can decree the forfeiture of a ship. Therefore, the Supreme Court for China and Korea at Shanghai has no jurisdiction to decree the forfeiture of a ship for having, contrary to sect. 69 of the same Act, used the British flag without authority to do so.

THE OWNERS OF AND PARTIES INTERESTED IN [THE STEAMSHIP "MAORI KING"] *v.* HIS BRITANNIC MAJESTY'S CONSUL-GENERAL AT SHANGHAI, [1909] A. C. 562; 78 L. J. P. C. 138; 100 L. T. 787; 25 T. L. R. 545; 53 Sol. Jo. 519—P. C.

## XIII. SIERRA LEONE.

[No paragraphs in this vol. of the Digest.]

## XIII.B. STRAITS SETTLEMENTS.

35. *Smuggling Opium—Conviction of Master of Steamship—Opium Ordinance (XX. of 1906), s. 73.*—The appellant was convicted of an infringement of sect. 73 of the Straits Settlements Opium Ordinance (XX. of 1906), which provides that if any ship is used for the importation, landing, removal, carriage, or conveyance of opium the master and owner shall be liable to a fine unless it is proved to the satisfaction of the Court that every reasonable precaution has been taken to prevent such user of the ship, and that none of the officers, their servants, or the crew or any persons employed on board the ship were implicated therein. A quantity of opium was found concealed under a seat plank in one of the lifeboats of the steamship of which the appellant was master. The appellant and his chief officer were the only witnesses examined for the defence, and they both proved that the strict rule of their owners was that their ships should be searched after leaving an Eastern port; that they had searched the ship and the particular lifeboat after leaving the previous port, though without taking up the seat plank; that they found no opium; and that the crew knew that it was forbidden to take opium on board. It was conceded that neither the owners nor these witnesses were themselves aware of the opium having been hidden in the lifeboat, but beyond their testimony no proof was given that none of the other officers, servants, crew, or other persons on board the ship were not aware of, or privy to the concealment of the opium, or were not implicated in the alleged use of the ship for importing it into Singapore.

HELD—that the conviction was right.

BRUHN *v.* THE KING (ON THE PROSECUTION OF [THE OPIUM FARMER]), [1909] A. C. 317; 100 L. T. 306; 25 T. L. R. 364; (*sub nom.* KRUHN *v.* R., ETC.), 78 L. J. P. C. 85—P. C.

36. *Will—Construction—Intestacy—Res judicata—Estoppel.*—By a decree of the Supreme Court of the Straits Settlements made in 1872, in the matter of the will of a testator who died in 1870, it was declared that the gift of a sum of money to be paid annually for charitable purposes was void, and "that the gift fell into the undivided residue of the testator's estate," and from 1872 to 1889 the money was paid to the next of kin. In proceedings in 1889 the trustees under the will contended that the money was payable to the residuary legatees, and not to the next of kin, but by a decree made in 1891 the Court declared that they were estopped from alleging that it was not wholly undisposed of by the will. In 1905, in further proceedings, the Court held that the estate was vested in the trustees in trust for the residuary legatees, save and except the yearly sum above mentioned, which was payable to the next of kin.

HELD—that the next of kin were estopped from saying that the whole of the estate was vested in the trustees for their benefit, and that the legatees were estopped from denying the right of the next of kin to the sum above mentioned.



## XIII. Straits Settlements—Continued.

Judgment of the Supreme Court of the Straits Settlements varied.

*Peareth v. Marriott* ((1882) 22 Ch. Div. 182; 52 L. J. Ch. 221; 48 L. T. 170; 31 W. R. 68—C. A.) followed.

*BADAR BEE v. HABIB MERICAN NOORDIN*, [1909] A. C. 615; 78 L. J. P. C. 161; *sub nom.* *TENGACHEE NACHIAH v. HABIB MERICAN NOORDIN AND OTHERS*, 101 L. T. 161—P. C.

## XIV. TRINIDAD.

[No paragraphs in this vol. of the Digest.]

## XV. ZANZIBAR.

[No paragraphs in this vol. of the Digest.]

## XVI. INDIA.

See also EXECUTORS, No. 9.

**37. *Burmah—Sale of Mortgaged Property by Order of Court—Purchaser unaware of Encumbrance—Ignorance of English—Misrepresentation—Indian Contract Act, s. 19—Principles where Court is Concerned in Sales.***—At an auction sale in execution held under the direction of the Court the appellant purchased property which he believed to be unencumbered, whereas he actually purchased a worthless equity of redemption. The circumstances were clearly proclaimed in English at the sale, but the appellant, very ignorant of English, was misled by a subsequent statement in the vernacular by an officer of the Court to the effect that the sale was at the instance of the mortgagees.

Sect. 19 of the Indian Contract Act provides that a contract is not voidable for misrepresentation if the party whose consent is so caused had the means of discovering the truth with ordinary diligence.

**HELD**—that sect. 19 of the Indian Contract Act had no application in this case.

**HELD FURTHER**—that, in sales under the direction of the Court, the Court must be scrupulous in the extreme and very careful that no taint or touch of misrepresentation is found in the conduct of its ministers, and that it would be disastrous if the Court were to enforce an illusory and unconscientious bargain against a purchaser misled by its duly accredited agents.

*MAHOMED KALA MEA v. HARPERINK AND OTHERS*, L. R. 36 Ind. App. 32; 25 T. L. R. 180—P. C.

**38. *Oudh—Bond Executed by Disqualified Proprietor—Setting Aside—Unconscionable Bargain—Indian Contract Acts, 1872, s. 16; and 1899, s. 2.***—A bond executed by a disqualified proprietor under the provisions of the Oudh Land Revenue Act, 1876, without the sanction of the Court, was set aside on the ground that he was placed in such a condition of helplessness that the lender was "in a position to dominate his will," and that the lender used that position to obtain an unfair advantage over the borrower.

*MANESHAH BAKHSH SINGH v. SHADI LAL AND OTHERS*, L. R. 36 Ind. App. 96; 25 T. L. R. 635—P. C.

**39. *Hindu Law—Succession—Lineal Primogeniture—Family Custom—Land Tenure in Orissa.***—Where the question for determination was whether the succession to an estate was governed by a family custom of succession by lineal primogeniture or by the ordinary Hindu law:—

**HELD**—that evidence adduced failed to give to the alleged custom the character of certainty which was essential to its validity and that therefore the succession was governed by the ordinary Hindu law.

*RAMA KANTA DAS MAHAPATRA v. SHAMANAND DAS MAHAPATRA*, L. R. 36 Ind. App. 49; 25 T. L. R. 407—P. C.

**40. *Money-lenders Act, 1900—Contract for Loan made in India—Contract Intended to be Performed in India—Jurisdiction of Court in England—63 & 64 Vict. c. 51, s. 1.***—Sect. 1 of the Money-lenders Act, 1900, does not apply to a contract made in India and intended to be performed there.

*Shrichand & Co. v. Lacon* (22 T. L. R. 245) followed.

*VELCHAND v. MANNERS*, 25 T. L. R. 329—[Darling, J.]

**41. *Hindu Law—Succession—Family Custom.***—There is nothing in the mere fact of partibility to make evidence of a family custom excluding or postponing daughters to collaterals in impartible estates necessarily inapplicable to partible estates.

*PARBATI v. RANI CHANDARPAL KUNWAR*, [L. R. 36 Ind. App. 125; 25 T. L. R. 551—P. C.]

**42. *Statute of Limitations—Grantee of Lease in Perpetuity—"Purchaser"—Indian Limitation Act, 1877, s. 10, Sched. II., art. 134.***—A lessee under a lease granted in perpetuity is not a "purchaser" within the meaning of article 134 of the Second Schedule to the Indian Limitation Act, 1877.

*ABHIRAM GOSWAMI MOHANT, DECEASED (NOW REPRESENTED BY NRITOMOYI DEBI) AND ANOTHER v. SHYAMA CHARAN NANDI AND OTHERS*, 25 T. L. R. 830—P. C.

## DEPENDANTS.

See MASTER AND SERVANT.

## DEPOSIT.

See BAILMENT; BANKERS; INSURANCE; PARLIAMENT.

## DEPOSITIONS.

See CRIMINAL LAW AND PROCEDURE; EVIDENCE.

**DEPRECIATION.**

*See* INCOME TAX; TRUSTS AND TRUSTEES.

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**DESCENT AND DISTRIBUTION.**

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**I. DEVOLUTION OF ESTATE.**

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**DESIGNS.**

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**DISCOVERY, INSPECTION & INTERROGATORIES.**

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*See also* EVIDENCE; HUSBAND AND WIFE, No. 37; MASTER AND SERVANT, No. 53; PATENTS, No. 10; PRACTICE.

**I. DISCOVERY.****(a) In general.**

1. *Application as to Specific Documents—Affidavit must Name and Identify—R. S. C. (I.), Ord. 31, r. 20 (3).*—In order to obtain an order for a discovery of documents, it is essential that the party making the application should, in his affidavit, name and specify, so that they can be identified, the particular documents of which he seeks discovery.

An order under the rule leaves wholly untouched the privilege claimed by the other side.

*White v. Spafford & Co.* ([1901] 2 K. B. 241—C. A.) followed.

*ROBERTS v. DUBLIN UNITED TRAMWAYS CO.*, [43 I. L. T. 203—C. A., Ireland.

**(b) Privilege.**

2. *Member of Trade Union—Legal Aid—Letters to Society Placing Facts of Alleged Wrongful Dismissal before Committee.*—The appellant, a signalman, was dismissed from the service of the respondent company. He was a member of the Amalgamated Society of Railway Servants, and requested that his case should be taken up by the society. An action claiming damages for wrongful dismissal having been commenced, the railway company took out a summons for discovery of all letters which had passed between the plaintiff and the society, giving the society the information which had led them to institute proceedings.

**HELD**—that such letters were not legal professional communications, and were not

**I. Discovery—Continued.**

protected by the privilege attaching to such communications.

Decision of U. A. (52 Sol. Jo. 840) affirmed.

JONES v. GREAT CENTRAL RY. CO., 100 L. T. [710; 53 Sol. Jo. 428—H. L.]

**(c) Ship's Papers.**

[No paragraphs in this vol. of the Digest.]

**II. INSPECTION.**

**3. Bankers' Books—Power of Magistrate to Make Order for Inspection Bankers' Books Evidence Act, 1879** (42 & 43 Vict. c. 11), ss. 7, 10.]—A magistrate has power to make an order for the inspection of a banker's book under sect. 7 of the Bankers' Books Evidence Act, 1879.

*R. v. Bradlaugh* ((1883) 15 Cox, C. C. 222 n.—dictum of Coleridge, J.) not followed.

*R. v. KINGHORN AND ANOTHER, EX PARTE DUNNING*, [1908] 2 K. B. 949; 78 L. J. K. B. 33; 99 L. T. 794; 72 J. P. 478—Div. Ct.

**III. INTERROGATORIES.**

**4. Slander—Privilege and Fair Comment—No Plea of Justification.**—The defendant, while acting as chairman of certain licensing justices, made statements concerning the plaintiffs, who were brewers, reflecting on the conduct of their business. The defence pleaded was (1) that, as the words were spoken by the defendant in his capacity of chairman, the occasion was privileged, and (2) fair comment. The defendant administered certain interrogatories with the view of establishing the truth of the alleged facts on which his comment was based. The Master allowed all the interrogatories, but the judge at chambers struck them all out on the ground that, as justification was not pleaded, they were oppressive.

**HELD**—that the defendant was entitled to administer such of the interrogatories as went to establish that the facts on which he had based his comment were truly stated, as the onus of proving that the words complained of were fair comment on a matter of public interest rested on him, and fair comment must be based upon facts truly stated.

Order of Bray, J., varied.

PETER WALKER & SONS, LD. v. HODGSON, [1909] 1 K. B. 239; 78 L. J. K. B. 193; 99 L. T. 902; 53 Sol. Jo. 81—C. A.

**5. Newspaper Competition—Plaintiff Disappointed at Not Receiving Prize—Action for Breach of Contract in not Paying Prize—Interrogatories as to Method of Adjudication—Not Relevant to Action Brought.**—The plaintiff entered for a competition in a newspaper, and was not awarded the first prize, to which he claimed to be entitled. He brought an action in a county court for breach of contract against the proprietors of the newspaper for not paying to him two monthly instalments of the first prize, and obtained leave from the judge to administer

interrogatories as to the methods employed by the defendants in adjudicating upon the answers sent in by the various competitors. The defendants appealed.

**HELD**—that the defendants could not be called upon to answer such interrogatories, as they had no bearing on the issue raised in the action as brought by the plaintiff.

ANDERSON v. C. A. PEARSON, LD., *Times*, [February 12th, 1909—Div. Ct.]

**DISEASES.**

See ANIMALS; PUBLIC HEALTH.

**DISHONOUR.**

See BILLS OF EXCHANGE.

**DISORDERLY CONDUCT.**

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**DISORDERLY HOUSES.**

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**DISTRESS.**

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**I. IN GENERAL.**

**1. Rent Due on Sunday—Distress on Monday.**—Rent may lawfully be made payable on a Sunday, and in such a case if it is not paid on that day a distress may be levied on the following day.

CHILD v. EDWARDS, [1909] 2 K. B. 753; 78 L. J. K. B. 1061; 101 L. T. 422; 25 T. L. R. 706—Ridley, J.



### I. In General—Continued.

2. "*No Sufficient Distress*"—*Evidence—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 139.*—It is not a condition precedent to proceeding under s. 139 of the County Courts Act, 1888, that a distress should have been put in and proved to be ineffectual. "No sufficient distress" may be proved by other evidence.

RICKETT v. GREEN, [1909] W. N. 262—Div. Ct.

### II. EXEMPTIONS.

#### (a) Generally.

3. *Goods Delivered for Exhibition only—Manufacturers' Sample—Motor Car Chassis—To be Managed in the Way of his Trade.*—A motor car chassis belonging to the manufacturers delivered to their agents, who are also agents for other manufacturers, for the purpose only of exhibition as a sample, is not privileged from distress on the agents' premises.

SIMMS MANUFACTURING CO. v. WHITEHEAD, [1909] W. N. 95—Hamilton, J.

4. *Tenant's Fixtures—Advertisement Hoardings—Affixed to Soil—Construction of Agreement—Demise or Licence—Plaintiff Company in Liquidation—Counter-claim—Set-off.*—By an agreement in writing between the plaintiffs and the defendants it was agreed that the defendants should let and the plaintiffs should take "the exclusive right of posting bills and exhibiting advertisements upon" specified land of the defendants, "and of fixing hoardings and doing all that is usual and proper to utilise the premises for billposting and advertising purposes for the term of seven years"; and one of the terms was, "rates and taxes to be paid by tenants." The plaintiffs placed upon the land hoardings erected upon stout posts driven 4 ft. into the ground, and supported by stays and struts driven into the ground. The sum of £151 being due and unpaid under the agreement, the defendants levied a distress and seized and removed and sold the materials of the hoarding. Afterwards the plaintiff company went into voluntary liquidation. The plaintiffs brought this action to recover damages, alleging that the hoarding was a fixture and therefore not distrainable, and that there was no demise, but only the grant of a licence. The defendants counter-claimed for £151 due under the agreement, less £68 realised by the distress.

HELD—that the hoardings were fixtures, though removable by the tenants, and therefore could not be distrained; and that there was not a demise, but only a grant of a licence.

HELD ALSO—that this was not a case for the application of the rule of set-off, but that judgment must be given separately for the plaintiffs on the claim and for the defendants on the counter-claim.

Decision of Bigham, J. reversed.

Darby v. Harris (1 Q. B. 895) approved and followed.

PROVINCIAL BILLPOSTING CO. v. LOW MOOR [IRON CO., [1909] 2 K. B. 344; 78 L. J. K. B. 702; 100 L. T. 726; 16 Manson, 157—C. A.]

5. *Wearing Apparel, Bedding and Tools and Implements of Trade to the Value of £5—Piano Hired for Teaching—Instrument of Trade—Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 147.*—A pianoforte, the property of the plaintiffs, was hired to H., on a hire-purchase agreement. The piano was used by H.'s wife for the purpose of giving music lessons to pupils on premises of which the defendant was the landlord. The defendant levied a distress on the premises for arrears of rent, and under that distress seized, amongst other things, the piano. Wearing apparel and bedding of the value of £5 were left on the premises.

HELD—that the pianoforte was an instrument of trade within the meaning of the Law of Distress Amendment Act, 1888.

HELD ALSO—that the requirements of the County Courts Act, 1888, s. 147, are satisfied provided wearing apparel or bedding or tools to the value of £5 are left on the premises.

BOYD, LD. v. BILHAM, [1909] 1 K. B. 14; 78 [L. J. K. B. 50; 99 L. T. 780; 72 J. P. 495—Channell, J.]

#### (b) Lodgers' Goods.

[No paragraphs in this vol. of the Digest.]

### III. PROCEDURE.

#### (a) Bailiff.

[No paragraphs in this vol. of the Digest.]

#### (b) Possession.

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#### (c) Rescue.

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#### (d) Sale.

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### DISTRICT COUNCILS.

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### DISUSED BURIAL GROUND.

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### DITCHES.

See HIGHWAYS; SEWERS AND DRAINS.

**DIVIDEND WARRANT.**

*See* COMPANIES

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**DIVIDENDS.**

*See* BANKRUPTCY; COMPANIES.

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**DIVORCE.**

*See* HUSBAND AND WIFE.

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**DOCKS.**

*See* RAILWAYS AND CANALS; SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

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**DOCTORS.**

*See* MEDICINE AND PHARMACY.

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**DOGS.**

*See* ANIMALS.

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**DOMESTIC ANIMALS.**

*See* ANIMALS.

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**DOMICIL.**

*See* BANKRUPTCY; CONFLICT OF LAWS.

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**DONATIO MORTIS CAUSA.**

*See* GIFTS.

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**DOWER.**

1. *Action for Assignment—Statute of Limitations—Time for ascertaining Value—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.*—A widow who has claimed and enjoyed as dowress her full right to the receipt from the co-heiresses of one-third of the net rents and profits of land is not prejudiced by

reason of not having claimed her right to an assignment. The Real Property Limitation Act, 1833, as amended by the Act of 1874, applies to an action at law or suit in equity to gain possession of a definite piece of land as distinguished from a proceeding to obtain a delimitation of parcels under which for the first time a title to a definite piece of land would be obtained. The doctrine of *laches*, which might be a bar to relief, can have no application when the dowress has up to a date less than twelve years before action brought been asserting and enjoying one part of her right of dowress. The time for ascertaining the value of land out of which dower is claimed is the date of the assignment, and not of the intestate's death.

*Marshall v. Smith* ((1865) 5 Giff. 37; 11 L. T. 443) questioned.

*Williams v. Thomas*, [1909] 1 Ch. 713; 78 [L. J. Ch. 473; 100 L. T. 630—C. A.]

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**DRAINAGE.**

*See* METROPOLIS; NUISANCE; PUBLIC HEALTH; SEWERS AND DRAINS.

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**DRAMATIC COPYRIGHT.**

*See* COPYRIGHT AND LITERARY PROPERTY.

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**DRUGGISTS.**

*See* MEDICINE AND PHARMACY.

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**DRUNKENNESS.**

*See* CRIMINAL LAW, Nos. 2, 39; INTOXICATING LIQUORS.

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**DURESS.**

*See* CONTRACTS; CRIMINAL LAW; EQUITY; REVENUE, No. 3; WILLS.

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**DYING DECLARATIONS.**

*See* CRIMINAL LAW AND PROCEDURE.

## EASEMENTS AND PROFITS À PRENDRE.

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See also FISHERIES; GAME; LANDLORD AND TENANT; LIMITATION OF ACTIONS; RAILWAYS, No. 2.

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### II. PARTICULAR EASEMENTS.

#### (a) Rights of Way.

##### (i.) *Abandonment*.

[No paragraphs in this vol. of the Digest.]

##### (ii.) *Conveyance*.

[No paragraphs in this vol. of the Digest.]

##### (iii.) *Excessive User*.

[No paragraphs in this vol. of the Digest.]

##### (iv.) *Grant of Right*.

1. *Presumption of Lost Grant—Prescriptive Right Defeated by Proof of Unity of Possession—Prescription at Common Law—Prescription Act, 1832 (2 & 3 Will. 4, c. 71), s. 2.*—H. brought an action, claiming an injunction to restrain D. from trespassing over a road which passed through H.'s property. D. claimed a right of way over such road by virtue of a grant then lost, of which the former existence was to be presumed.

HELD—that though the defendant could not make good any claim to a right of way under sect. 2 of the Prescription Act, 1832, as such a claim was defeated by proof of unity of possession for a period, nor to a right of way by prescription at common law as such right

originated at a date long subsequent to the reign of Richard I., in the circumstances of the case there was justification for making the presumption of a modern grant since lost or not produced.

Decision of Joyce, J. (78 L. J. Ch. 457; 100 L. T. 777) affirmed.

HULBERT v. DALE, [1909] 2 Ch. 570; 101 L. T. [504—C. A.]

##### (v.) *Prescription*.

See No. 1, *supra*.

##### (vi.) *Private Right of Way*.

[No paragraphs in this vol. of the Digest.]

##### (vii.) *Way of Necessity*.

[No paragraphs in this vol. of the Digest.]

#### (b) Rights of Water and Watercourses.

2. *Artificial Watercourse—Higher and Lower Proprietors—Right to Abstract Water—Terms of Presumed Grant—Right to Bed of Channel.*—An artificial watercourse, constructed about 400 years ago, flowed from the River Eden at a point above the plaintiffs' tannery, and subsequently rejoined the river at a point below the defendants' mill. The defendants regulated the flow of water into the watercourse by means of a weir or sluice gates. The defendants having cut off the inflow of water, entered upon the bed of the stream and cut off the plaintiffs' pipes, which projected into the stream, and which were used in connection with their tannery, which was established in 1673. In an action by the plaintiffs for an injunction to restrain the defendants from interfering with the flow of water in the watercourse and from trespassing upon the bed of the watercourse:—

HELD, granting an injunction—that the Court ought to infer that the watercourse was originally constructed for the mutual benefit of the tannery and the mill, and that the plaintiffs, as owners and occupiers of the tannery, were entitled, under a reservation made, or an agreement entered into, when the channel was constructed, to the enjoyment of a reasonable use of the water therein, not causing any sensible or material injury to the defendants as owners and occupiers of the mill.

*Semble*, in cases where an artificial channel or cut passes by or through the land of several proprietors, and water flows therein to serve the purposes of a lower proprietor, the proper grant to presume, in the absence of all evidence as to the terms and conditions upon which the channel was originally made, is the grant of a watercourse—that is, of the easement or right to the running of water; and *primâ facie*, under such circumstances, every proprietor of land on the banks of such a channel or cut is entitled to that moiety of the bed of the channel which adjoins his land.

WHITMORES (EDENBRIDGE), LD. v. STANFORDS, [1909] 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 924; 25 T. L. R. 169; 53 Sol. Jo. 134—Eve, J.

##### (c) Right to Light.

[No paragraphs in this vol. of the Digest.]



II. Particular Easements—*Continued.*

## (d) Right to Support.

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See CHARITIES.

## ECCLESIASTICAL LAW.

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## I. CHAPELS.

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## II. CHURCH OF ENGLAND.

## (a) Discipline and Ecclesiastical Offences.

1. *Repulsion from Holy Communion*—"Open and Notorious Evil Liver"—*Marriage with Deceased Wife's Sister*—*Deceased Wife's Sister's Marriage Act, 1907* (7 Edw. 7, c. 47), s. 1.]—A member of the Church of England who has married his deceased wife's sister is not, since the passing of the Deceased Wife's Sister's Marriage Act, 1907, an "open and notorious evil liver" within the meaning of the rubric prefixed to the service of the Holy Communion in the Book of Common Prayer, so as to justify his repulsion from the Holy Communion; and the first proviso in sect. 1 of the Deceased Wife's Sister's Marriage Act, 1907, does not protect a clergyman of the Church of England in respect

of his repulsion of such person from the Holy Communion.

Decision of Div. Ct. (78 L. J. K. B. 976; 101 L. T. 106; 25 T. L. R. 553) affirmed.

R. v. DIBBIN, EX PARTE THOMPSON, 26 T. L. R. [150—C. A.]

2. *Reservation of Sacrament—Use of Unauthorised Rites and Ceremonies—Disobedience to Monition—Deprivation.*]—Sentence of deprivation passed upon a beneficed clergyman for ecclesiastical offences, viz., reservation of the sacrament after being monitioned not to repeat the offence, the use of unlawful ceremonies, and contumacy.

BISHOP OF OXFORD v. HENLY, [1909] P. 319; [25 T. L. R. 826—Dean of Arches.]

## (b) Ornaments and Erections in Churches.

3. *Faculty—Fitting up Portion of North Aisle as a Side Chapel.*]—A faculty was granted authorising the fitting up of a small portion of the north aisle of a church with a holy table and prayer and reading desks, such portion of the aisle to be used as a side chapel.

ST. PAUL'S, BRENTFORD, 25 T. L. R. 228 — [London Consistory Ct.]

4. *Rood Beam—Sanctus Bell—Alterations to enable Bell in Tower to be Rung from Interior—Faculty Refused.*]—A faculty for the erection of a rood beam with a crucifix and figures of St. John and the Virgin Mary upon it was refused on the ground that in effect it might not be decorative only, but might lead to superstitious uses. A faculty for alterations in a church to enable a bell in the tower to be rung from the interior as a sanctus bell was refused on the ground that such an arrangement could not be distinguished from a hand bell rung as a sanctus bell, which was unlawful.

*Elphinstone v. Purchas* ((1870) L. R. 3 A. & E. 66 at p. 98) followed.

VICAR AND CHURCHWARDENS OF ST. JOHN THE [EVANGELIST, CLEVEDON v. ALL HAVING INTEREST, [1909] P. 6—Chancellor of Diocese of Bath and Wells.]

5. *Rood Beam—Faculty.*]—Faculty refused for the erection of a beam across the entrance to the chancel enriched with gilt cresting and having an inscription on its face and scroll, with a central cross on the beam containing the figure of our Lord "crowned and reigning on the Tree," and idealised figures of the Virgin and St. John.

ST. PAUL, BOW COMMON, [1909] P. 245; 25 [T. L. R. 425—Consist. Ct. of London.]

## III. CHURCHWARDENS.

6. *Allotment of Seats in Church—Provision Excluding Right to Seats at Certain Services—Filling Seats before Commencement of Service.*]—It is the long-established practice of Chancellors in Ecclesiastical Courts in making or approving allotments of seats to parishioners to do so in general terms entitling the allottees to occupy

**111. Churchwardens—Continued.**

their seats at all the ordinary services of the church both on Sundays and on other days. Therefore a provision cannot be added to an allotment of seats whereby the right of the allottees is to be excluded at Sunday evening services or at early Communion services on Sunday morning.

The allotment of seats is no concern of the vestry, but rests with the churchwardens as officers of the ordinary. Any opinion expressed by the vestry is therefore not binding on the churchwardens.

The churchwardens are entitled to put into vacant allotted seats other persons than the allottees after the commencement of the service, but not before.

CLAUVERLEY (VICAR, ETC.) *v.* CLAUVERLEY (PARISHIONERS, ETC.); CLAUVERLEY (CHURCHWARDENS) *v.* CLAUVERLEY (VICAR, ETC.); GATACRE AND LEGH *v.* CLAUVERLEY (VICAR, ETC.), [1909] P. 195—Dr. Tristram, K.C.

**IV. CLERGY.**

[No paragraphs in this vol. of the Digest.]

**V. DILAPIDATIONS.**

[No paragraphs in this vol. of the Digest.]

**VI. ECCLESIASTICAL COURTS.**

[No paragraphs in this vol. of the Digest.]

**VII. ENDOWMENTS.**

**7. Church Rates—Refusal to Pay—Rector Non-resident in Parish—**57 Geo. 3, c. vii.]—A person duly rated under 57 Geo. 3, c. vii. (which makes provision for the support and maintenance of the rector of the parish of St. Olave, Southwark), is not entitled to refuse payment of the rate on the ground that the rector does not reside within the parish, or that he is rendering services outside the parish as a diocesan missionary.

THE PROPRIETORS OF HAY'S WHARF, LD. *v.* [TRUSTEES OF ST. OLAVE'S (SOUTHWARK)]  
73 J. P. 375; 25 L. T. R. 648; 7 L. G. R.  
1022—Div. Ct.

**VIII. FACULTIES.**

See also Nos. 3, 4, 5, *supra*.

**8. Confirmatory Faculty—Raising Holy Table—Dossal—Sanctuary Lamp—Holy Table in Side Chapel—Costs of Faculty.]**—Confirmatory faculty granted for the raising of the holy table in St. Andrew's, Haverstock Hill; for placing a retable at the back of the holy table with six candlesticks thereon; for the removal of two seats in the church and the choir stalls to make room for the procession of the clergy; and for the retention of a side chapel with a holy table therein for the use of small congregations; but confirmatory faculty refused for the retention of a dossal with side wings so far as it blocked out the east window and covered the tables of the Commandments, but granted so far as it was used for covering the unfinished walls. The costs of the hearing and of the faculty ordered to be paid by the vicar in consequence

of his having made the various alterations without a faculty.

ST. ANDREW'S, HAVERSTOCK HILL, 25 T. L. R. 408—Dr. Tristram, K.C.

**9. Erection of Parish Hall on Unconsecrated Ground forming part of Churchyard.]**—Faculty granted authorising the erection of a parish hall at the west end of a parish church on a piece of unconsecrated ground forming part of the churchyard.

HOLY TRINITY, HOXTON, 25 T. L. R. 570—[Dr. Tristram, K.C.]

**10. Extension and Alteration of Chancel.]**—Faculty granted authorising *inter alia* the extension of the chancel on unconsecrated ground—such extension to be consecrated.

ST. BARNABAS, KENSINGTON, 25 T. L. R. 571—[Dr. Tristram, K.C.]

**11. Faculty Seats—Faculty to Re-pew Church—Original Faculty Lost—Sanction of Allotment of Seats—Presumption.]**—In 1834 a faculty was granted by the Official Principal of the Court of the Royal Peculiar of Bridgnorth to the vicar and churchwardens of C. authorising them to re-pew the church and to erect a gallery at the west end. The original faculty had been lost together with other documents relating to proceedings in the Bridgnorth Court. The Court was now asked to presume that allotments of seats made by the churchwardens in 1834 had been subsequently sanctioned by an order of the Official Principal thereby constituting them faculty seats.

HELD—that such a presumption would be inconsistent with the fact that in 1825 Sir J. Nicholl, in *Fuller v. Lane* (2 Add. 419, 425), in the Arches Court of Canterbury, although not the Appellate Court of Ecclesiastical Courts in a Royal Peculiar, clearly laid down that the former practice of freely granting faculty seats on the re-pewing of a church should be discontinued.

CLAUVERLEY (VICAR, ETC.) *v.* CLAUVERLEY (PARISHIONERS, ETC.); CLAUVERLEY (CHURCHWARDENS) *v.* CLAUVERLEY (VICAR, ETC.); GATACRE AND LEGH *v.* CLAUVERLEY (VICAR, ETC.), [1909] P. 195—Dr. Tristram, K.C.

**12. Erection of Choir Vestry on Site of Disused Burial Ground.]**—Faculty granted for the erection of a choir vestry on part of disused burial ground.

ST. MARGARET, LOTHBURY (RECTOR, ETC.) *v.* [LONDON COUNTY COUNCIL, [1909] P. 310;  
25 T. L. R. 734—Dr. Tristram, K.C.]

**13. Demolition of Old Church—Removal of Memorials, Bells, and Clock to New Church.]**—Decision of the Chancellor of the Diocese of Winchester granting a faculty for the pulling down of the nave of an old parish church, and the removal of the memorials, bells, and clock to a new church, which had been erected in substitution for the former church; affirmed on appeal to the Court of Arches.

ST. MARY, BISHOPSTOKE, 26 T. L. R. 86—Dean [of Arches.]

VIII. **Faculties**—*Continued.*

14. *Holy Table—Marble Slab on Table.*—Faculty refused for the placing in the chancel of a parish church a new Communion table with a marble slab on the top of it.

HAYES PARISH CHURCH, 26 T. L. R. 89—Dr.  
[Tristram, K.C.]

15. *Bells in New Church—Agreement as to Ringing—Jurisdiction.*—The Court has jurisdiction to grant a faculty sanctioning an agreement as to the times of ringing bells to be placed in a new church when erected.

ST. JUDE'S, HAMPSTEAD, *Times*, August 6th,  
[1909—Dr. Tristram, K.C.]

IX. **FIRST FRUITS AND TENTHS.**

[No paragraphs in this vol. of the Digest.]

X. **GLEBE.**

[No paragraphs in this vol. of the Digest.]

XI. **TITHE.**

16. *Commissioners—Overseers—Union of Parishes*—4 Geo. 4, c. cxviii.—*City of London (Union of Parishes) Act*, 1907 (7 Edw. 7, c. cxl.).—4 Geo. 4, c. cxviii., provides that the churchwarden of the City liberty of St. A. (which has two liberties outside the City), two inhabitant householders of the City liberty who are overseers, if not Quakers, and ten elected inhabitants shall be commissioners charged with the duty of paying the rector £700 a year in lieu of tithe.

7 Edw. 7, c. cxl., provided that certain parishes, including St. A., shall, for purposes other than ecclesiastical, charitable and some others, be formed into one, of which the Common Council shall be overseers.

HELD—that this does not make the Common Council a constituent member of the commission, and the churchwarden and elected commissioners can act alone.

WAGSTAFF v. LONDON CORPORATION, [1908]  
[W. N. 202 : 99 L. T. 791 ; 72 J. P. 477 ; 25 T. L. R. 1 ; 7 L. G. R. 69—Eady, J.]

XII. **MISCELLANEOUS.**

17. *Parish Clerk—Tenure of Office—Church Building Act*, 1818 (59 Geo. 3, c. 134), s. 29—*New Parishes Act*, 1856 (19 & 20 Vict. c. 104), s. 9.—The plaintiff was appointed to perform the duties of parish clerk of a church in a parish constituted under the Church Building Acts, and he was paid a weekly salary in addition to fees.

HELD—that he was a parish clerk within the meaning of sect. 29 of the Church Building Act, 1818, and that his office was an annual one.

BAILEY v. EDMUNDSON AND OTHERS, 25 T. L. R.  
[681—Div. Ct.]

**EDUCATION.**

COL.

I. **MAINTENANCE OF SCHOOLS** . . . 194II. **ENDOWED SCHOOLS ACTS** . . . 196

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IV. **SCHOOL ATTENDANCE AND CHILD**

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V. **TEACHERS AND OFFICERS.**

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(b) Officers . . . 198

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See also CHARITIES.

I. **MAINTENANCE OF SCHOOLS.**

1. *Local Education Authority—Contract for Water Supply to Non-Provided School—Education Act*, 1902 (2 Edw. 7, c. 42), s. 7.—A local education authority, which by sect. 7 of the Education Act, 1902, has to maintain and keep efficient public elementary schools, may make directly, and be liable on, a contract with a water company for the supply of water to a non-provided school.

TROWBRIDGE WATER CO. v. WILTS COUNTY COUNCIL, [1909] 1 K. B. 824 ; 78 L. J. K. B. 406 ; 101 L. T. 35 ; 73 J. P. 280 ; 25 T. L. R. 388 ; 53 Sol. Jo. 448 ; 7 L. G. R. 484—Div. Ct.

2. *Local Education Authority—County Borough—"The Council"—Conveyance—Education Act*, 1902 (2 Edw. 7, c. 42), s. 1.—In the Education Act, 1902, the expression "the Council" in reference to a county borough means the mayor, aldermen, and burgesses acting by their council, who, therefore, can acquire and hold real estate, and are the proper body to whom a conveyance should be made for the purposes of the Education Acts.

IN RE A CONTRACT BETWEEN THE LEEDS [INSTITUTE OF SCIENCE, ETC., AND THE LEEDS CITY COUNCIL, [1909] 1 Ch. 500 ; 78 L. J. Ch. 321 ; 100 L. T. 468 ; 73 J. P. 201 ; 25 T. L. R. 297 ; 7 L. G. R. 912—Eady, J.]

3. *Local Education Authority—Provided School—Defect in Playground—Liability for Injury to Scholar—Education Acts*, 1870 (33 & 34 Vict. c. 75), ss. 14, 15, 18, 19, 30, and 1902 (2 Edw. 7, c. 42), ss. 5, 7.—In the exercise of its powers and duties under the Education Act, 1902, a county council, as the local education authority, does not act ministerially only ; and it may be sued in respect of damage resulting from negligence in its performance of those duties.

The plaintiff, a scholar attending a provided school, was injured by catching his foot in a hole in the school playground while he was lawfully in the playground. In an action against the defendants, as the local education authority, the jury returned a verdict in favour of the plaintiff, finding that the defective condition of the playground was due to the negligence of the defendants.

HELD—that the defendants were bound to maintain and keep efficient the playgrounds of a provided school, and to keep them in good repair and safe for the use of the scholars while lawfully there ; and as the defendants had failed in this duty they were liable in damages to the plaintiff.

Toseland v. West Ham Union ([1907] 1 K. B. 920 ; 76 L. J. K. B. 514 ; 96 L. T. 519 ; 71 J. P.



**I. Maintenance of Schools—Continued.**

194 : 23 T. L. R. 325 ; 5 L. G. R. 507—C. A.) distinguished.

**CHING v. SURREY COUNTY COUNCIL.** [1909]  
[2 K. B. 762 ; 78 L. J. K. B. 927 ; 100 L. T.  
940 ; 73 J. P. 441 ; 25 T. L. R. 702 ; 7 L. G. R.  
845—Bucknill, J.]

**4. Local Education Authority—Negligence—Dangerous Premises—Swing Door in Infants' School—Trap—Duty to "Maintain and Keep Efficient" School—Education Act, 1902** (2 Edw. 7, c. 42, s. 7.)—The plaintiff, a girl of six years of age, was a scholar at a school under the control of the defendants as the local education authority. Two of the rooms in the school were connected by a heavy swing door, which was put up before the school passed under the defendants' control. On November 4th, 1908, the plaintiff was told by the teacher to leave the room, and, in using the swing door to do so, was injured.

In an action for damages, the jury found that the defendants were guilty of negligence in allowing the door to remain as it was, and, in answer to a further question, found that the door as originally constructed was not suitable for use by infants.

**HELD**—that the jury's answers amounted to a finding that the door as originally constructed was, with regard to a child like the plaintiff, a trap ; that as it was a trap in the first instance, it was negligence on the part of the defendants to allow it to remain in the same condition ; and therefore that the defendants were liable.

*Ching v. Surrey County Council* (*supra*) considered.

**MORRIS v. CARNARVON COUNTY COUNCIL,**  
[1909] W. N. 263 ; 26 T. L. R. 137—Div. Ct.

**5. Non-Provided School—"Maintain and Keep Efficient"—Teachers' Salaries—Local Education Authority—Power to Discriminate between Provided and Non-Provided Schools—Board of Education—Education Act, 1902** (2 Edw. 7, c. 42), s. 7.)—A local education authority has no power under the Education Act, 1902, to differentiate between the salaries paid to teachers in provided and in non-provided schools where the teachers are equally qualified and are teaching the same subjects.

Where a local education authority have refused to provide adequate salaries to the teachers of a non-provided school and that school is kept efficient, in so far as it is efficient, by the managers supplementing the amounts allowed for teachers' salaries by the local education authority, the local education authority have not discharged their statutory duty of maintaining and keeping efficient the schools imposed by sect. 7 of the Education Act, 1902.

**R. v. BOARD OF EDUCATION, EX PARTE THE [MANAGERS OF OXFORD STREET SCHOOL, SWANSEA,** [1909] 2 K. B. 1045 ; 101 L. T. 301 ; 73 J. P. 469 ; 25 T. L. R. 795 ; 7 L. G. R. 929—Div. Ct.]

**6. Trust for National Schools—Gift over if "School Board" or other Representative Body**

*Formed under Education Acts—Education Act, 1902* (2 Edw. 7, c. 42), ss. 1, 13.]—Trustees were directed in August, 1902, to pay a certain income "to the trustees of the national schools at A. for the purposes of education at such schools and the carrying on of the same until a school board or other representative body under the Education Acts shall be formed for the parish of A," with a gift over in that event.

**HELD**—that as the Education Act, 1902, abolished school boards and all representative educational bodies elected or constituted for educational purposes and transferred all the powers to the existing county authorities and made them educational authorities within the areas, it could not be said that a "school board" had been established for the parish of A., and that "other representative body" must mean such a representative body as is analogous to a school board.

**IN RE SMALLWOOD'S TRUSTS, GOTHARD v. [CHAPMAN,** 73 J. P. N. C. 599 ; 128 L. T. Jo. 125—Parker, J.]

**7. Site for National School—Disuse of School for Secular Purposes—Reverter of Land—School Sites Act, 1841** (4 & 5 Vict. c. 38), s. 2.]—In 1898 a site for a school was granted by deed poll under the School Sites Act, 1841, to the minister and churchwardens of a parish upon trust to permit the premises and all buildings erected thereon to be appropriated and used as a school for the education of the poorer classes in the parish, and that the school should be carried on according to the principles of the Established Church. The school could be used also for a Sunday school. Till 1907 the land and buildings, thereon were used as a public elementary school, but the education authority having opened a provided school the school in question ceased to be used for the purposes of a school except that a Sunday school continued to be held in the school building.

**HELD**—that the expression "the purposes in this Act mentioned" in the proviso to sect. 2 of the School Sites Act, 1841, meant the purposes to which the land was devoted by the grantor ; that the purpose to which the land in question was devoted by the donor was for a day school for the education of the poor, the holding of a Sunday school being merely permissive and ancillary to that purpose ; and that as the premises had ceased to be used for the purposes of a day school, they reverted to the donor under sect. 2 of the School Sites Act, 1841.

**ATTORNEY-GENERAL v. SHADWELL,** [1909]  
[W. N. 229 ; 101 L. T. 630 ; 26 T. L. R. 82—  
Warrington, J.]

**II. ENDOWED SCHOOL ACTS.**

[No paragraphs in this vol. of the Digest.]

**III. RELIGIOUS INSTRUCTION.**

[No paragraphs in this vol. of the Digest.]

**IV. SCHOOL ATTENDANCE AND CHILD LABOUR.**

**8. Attendance Order—Irregular Attendance—Fault of Child—Elementary Education Act, 1876** (39 & 40 Vict. c. 79), ss. 4, 11.]—Where a parent

#### IV. School Attendance and Child Labour—Continued.

has caused his child to be enrolled as a pupil at an elementary school, but the child has only attended four times out of a possible thirty, and this irregular attendance is the fault of the child and not of the parent, an attendance order may be made under sect. 11 of the Elementary Education Act, 1876, against the parent for habitually neglecting without reasonable excuse to provide efficient elementary instruction for his child.

LONDON COUNTY COUNCIL *v.* HEARN, 78 L. J. [K. B. 414; 100 L. T. 438; 73 J. P. 211; 25 T. L. R. 303; 7 L. G. R. 312—Div. Ct.]

9. *Attendance Order—Change of School—Reasonable Excuse—Elementary Education Act, 1876* (39 & 40 Vict. c. 79), s. 12.—The respondent was summoned for non-compliance with an attendance order directing that the respondent's child should attend a certain school. It was proved that since the date of the attendance order the child had been withdrawn from the school named in the order and had been entered as a pupil at another public elementary school, at which, during a period of five weeks, she had made twenty-nine out of forty-six possible attendances.

HELD—that as the child was not attending the school to which she had been transferred in such a way as to constitute a reasonable excuse for non-compliance with the attendance order, the respondent had committed the offence for which he was summoned.

ISLE OF WIGHT COUNTY COUNCIL *v.* HOLLAND, [73 J. P. 507; 7 L. G. R. 1182—Div. Ct.]

10. *Employment of Child in Agriculture—By-laws as to School Attendance—Total Exemption of Child at Age of Thirteen—Elementary Education Acts, 1870* (33 & 34 Vict. c. 75), s. 74 (2); 1876 (39 & 40 Vict. c. 79), ss. 5, 48; 1880 (43 & 44 Vict. c. 23), s. 4; 1893 (56 & 57 Vict. c. 51), ss. 1, 2; 1899 (62 & 63 Vict. c. 13), s. 1; and 1900 (63 & 64 Vict. c. 53), s. 6.—The respondent was charged on an information for having employed in agriculture on full time a child under fourteen years of age in contravention of the Elementary Education Act, 1876. The justices dismissed the information on the ground that the child was wholly and beneficially employed in agriculture, and, being over thirteen, was totally exempt from school attendance.

HELD—that sect. 1 of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, contemplated the making of bye-laws by local education authorities allowing complete exemption from school attendance at thirteen years of age of children employed in agriculture; that such provision was not affected by the Elementary Education Act, 1900; and that the justices were right in holding that under the bye-laws in question the child was totally exempt from school attendance.

STRONG *v.* TREISE, [1909] 1 K. B. 613; 78 L. J. [K. B. 401; 100 L. T. 340; 73 J. P. 105; 25 T. L. R. 214; 7 L. G. R. 411—Div. Ct.]

11. *Employment of Child by Servant—Offence by Master—Employment of Children Act, 1903* (3 Edw. 7, c. 45), s. 6 (3).—The respondent was summoned under a bye-law made in pursuance of the Employment of Children Act, 1903, for employing a child, liable to attend school full time, between 8.30 a.m. and 5 p.m., on a day when the school was open. The child was engaged and his wages paid by a vanman who was in the employment of the respondent and who did so for his own convenience and benefit. The engagement of the child was a voluntary and gratuitous act on the part of the vanman and formed no part of any arrangement between him and the respondent. No information had been laid by the respondent under sect. 6 (3) of the Employment of Children Act, 1903.

HELD—that as the vanman did not purport to take the child into employment on behalf of the respondent, the respondent had not committed the offence charged.

ROBINSON *v.* HILL, [1909] W. N. 206; 101 [L. T. 573; 73 J. P. 514; 26 T. L. R. 17; 7 L. G. R. 1065—Div. Ct.]

#### V. TEACHERS AND OFFICERS.

##### (a) Teachers.

[No paragraphs in this vol. of the Digest.]

##### (b) Officers.

[No paragraphs in this vol. of the Digest.]

#### EDUCATION ACTS.

See CHARITIES; EDUCATION.

#### EJECTION.

See LANDLORD AND TENANT.

#### ELECTION.

See WILLS.

#### ELECTIONS.

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See also RATES AND RATING.

**I. DISQUALIFICATION.**

1. *Corrupt Practice by Agents—Corrupt and Illegal Practices Prevention Act, 1883* (46 & 47 Vict. c. 51), s. 6, sub-s. 3 (a), s. 38, sub-s. 5 — *Municipal Elections (Corrupt and Illegal Practices) Act, 1884* (47 & 48 Vict. c. 70), ss. 2, 3, sub-s. 2, s. 23.]—Sect. 6, sub-sect. 3 (a), and sect. 38, sub-sect. 5, of the Corrupt and Illegal Practices Prevention Act, 1883, which are made to apply to municipal elections by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, ss. 2, 23, apply to the case of a candidate being reported by the election court for a corrupt practice committed by him personally or with his knowledge and consent, but do not apply to the case of a candidate reported for a corrupt practice by his agents without his knowledge and consent. Therefore in the latter case the candidate is not disentitled to be put on the register for the period of seven years.

MORRIS v. TOWN CLERK OF SHREWSBURY, [1909] 1 K. B. 342; 78 L. J. K. B. 234; 99 L. T. 964; 73 J. P. 28; 7 L. G. R. 125; 2 Smith, Reg. 123—Div. Ct.

**II. THE ELECTION.**

[No paragraphs in this vol. of the Digest.]

**III. ILLEGAL PRACTICES.**

[No paragraphs in this vol. of the Digest.]

**IV. LODGER VOTES.**

2. *Lodger Claim by Son of Landlord—Evidence Rebutting Primâ Facie Evidence—Parliamentary and Municipal Registration Act, 1878* (41 & 42 Vict. c. 26), s. 23.]—In a claim to vote as a lodger the claimant set out his name, the description of the rooms occupied by him, the amount of rent paid and the name and address of the person to whom he paid rent, the surname of the latter being the same as the claimant's. No formal objection was made to the claim. The revising barrister, having questioned the overseer and ascertained that the claimant was the son of his alleged landlord, held that the relationship rebutted the *primâ facie* evidence of qualification furnished by the declaration annexed to the claim under sect. 23 of the Parliamentary and Municipal Registration Act, 1878.

HELD—that there was no evidence to rebut the *primâ facie* evidence of the declaration, and that the claim ought to have been allowed.

MAJOR v. TOWN CLERK OF SHREWSBURY, [1909] 1 K. B. 348; 78 L. J. K. B. 108; 99 L. T. 855; 73 J. P. 26; 7 L. G. R. 65; 2 Smith, Reg. 114—Div. Ct.

3. *Objection by Overseers—Attendance of Overseers at Revision Court in Support of Objection*

COL. — *Parliamentary and Municipal Registration Act, 1878* (41 & 42 Vict. c. 26), ss. 22, 28 (9), (10) and (11).]—Where a person already on the lodgers' list for a ward in a borough duly sends his claim and declaration to the overseers for insertion in the new lodgers' list, and the overseers include his name in the list which they duly sign and publish, but they object to the said claim by adding in the margin of the list, opposite the claimant's name, the words "objected to," pursuant to sect. 22 of the Parliamentary and Municipal Registration Act, 1878:

HELD—that unless the overseers appear by themselves or by some person on their behalf at the revision court, in support of their objection, the revising barrister is bound by sect. 28 (9) of the Act to retain upon the lodgers' list the name of the person objected to, although by sect. 28 (10) and (11) of the Act, the overseers, if they appear in support of their objection, need not give *primâ facie* proof of their objection.

CARTWRIGHT v. TOWN CLERK OF SHREWSBURY, [1909] 2 K. B. 169; 78 L. J. K. B. 609; 100 L. T. 703; 73 J. P. 310; 25 T. L. R. 421; 7 L. G. R. 559; 2 Smith, Reg. 163—Div. Ct.

**V. PETITION.**

4. *Municipal Election—Reviewing Acts of Returning Officer—Municipal Corporations Act, 1882* (45 & 46 Vict. c. 50), s. 87.]—A writ of prohibition or mandamus does not lie for the purpose of determining whether a returning officer has wrongly and illegally rejected the nomination paper of a candidate for a municipal election. Such a case is provided for by the Municipal Corporations Act, 1882, s. 87, and the proper mode of determining the question is by an election petition.

R. (O'LEHANE) v. TOWN CLERK OF DUBLIN, 43 [I. L. T. 169—Div. Ct., Ireland.

5. *Premature Presentation—Irregularity—Waiver—Municipal Election.*]—The premature presentation of a petition in connection with a local government election does not nullify the petition, but is an irregularity which is capable of being waived by the person raising the objection.

Decision of Div. Ct. affirmed.

IN RE GRANGEMELLON ELECTION PETITION, [[1909] 2 I. R. 90—C. A., Ireland.

**VI. OCCUPATION VOTERS.**

6. *Lodger or Occupier—Objection to Voter—Primâ facie Proof—"Evidence, Repute or Otherwise"—"Repute," when may be Acted On—Remitting Case to Revising Barrister—Parliamentary and Municipal Registration Act, 1878* (41 & 42 Vict. c. 26), s. 28 (10).]—By sect. 28 (10) of the Parliamentary and Municipal Registration Act, 1878: "If the objector so appears the revising barrister shall require him, unless he is an overseer . . . to give *primâ facie* proof of the ground of objection . . . and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain



# VI. Occupation Voters.—Continued.

the name of the person objected to. . . . The *prima facie* proof shall be deemed to be given by the objector if it is shown to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to."

HELD—that a revising barrister may act upon repute in aid of the objector in the circumstances mentioned in the sub-section, but that he may not act upon repute for the purpose of defeating an objection.

A revising barrister having acted upon repute in disallowing objections to the retention of certain names upon the occupiers' list of voters for a borough, the Court, upon a case stated, remitted the matter to the revising barrister to continue the revision as to the names objected to, although the time in which the lists should have been revised had expired.

KENT *v.* FITTALL (No. 2), [1908] 2 K. B. 933; [77 L. J. K. B. 1065; 72 J. P. 421; 99 L. T. 761; 24 T. L. R. 665, 830; 52 Sol. Jo. 534, 714; 6 L. G. R. 672, 1047; 2 Smith, 63—Div. Ct. and C. A.

7. *Lodger or Occupier—Objection to Voter—Prima facie Proof—Evidence of Mode of Occupation in Borough—Parliamentary and Municipal Registration Act, 1878* (41 & 42 Vict. c. 26), s. 28, sub-s. 10.]—Objection was taken to the retention of the names of a number of persons on the occupiers' list of voters for a borough, and in support thereof the objector proved as to each of these persons (1) that the dwelling-house in respect of which he claimed to be placed on the list formed part of a house which was itself an ordinary dwelling-house; (2) that the landlord to whom such person paid rent also resided in the house; and (3) that the landlord was rated and paid the rates for the whole house as a separate tenement. The revising barrister thereupon took evidence upon oath from the assistant overseer and registration clerk which showed that in the particular borough it was usual in the case of such occupations for the occupant to have the free and exclusive use of the tenement, and that the landlord's residence in the house was under identically the same conditions as that of the occupant or occupants. Upon that evidence the revising barrister held that it had not been shown to his satisfaction that the objector had given *prima facie* proof of the ground of objection within sect. 28, sub-sect. 10, of the Parliamentary and Municipal Registration Act, 1878, and the revising barrister accordingly retained the names of the persons objected to on the list.

HELD, on a case stated—that the revising barrister was not entitled to act on the evidence which had been given as to the usual mode of occupation of tenement houses in the particular borough; that he must deal with the cases of the particular persons objected to; and, accordingly, that the case must go back to the revising

barrister in order that he might complete the revision.

KENT *v.* FITTALL (No. 3), [1909] 1 K. B. 215; [78 L. J. K. B. 110; 99 L. T. 776; 73 J. P. 33; 25 T. L. R. 11; 53 Sol. Jo. 48; 7 L. G. R. 37; 2 Smith, Reg. 93—Div. Ct.

8. *Successive Occupation—Second Dwelling-house not Rated—Representation of the People Acts, 1832* (2 & 3 Will. 4, c. 45), s. 30, and 1867 (30 & 31 Vict. c. 102), s. 3.—*Parliamentary Electors Registration Act, 1868* (31 & 32 Vict. c. 58), s. 30.]—P. occupied, during the whole of the qualifying period, in immediate succession two houses in Torquay, and had been duly rated and had paid all rates in respect of the first house. He entered into occupation of the second house in June, but as at the time of the making of the then current rate the second house was unfinished, he was not rated in respect thereof, nor was any other person rated in respect thereof, between the commencement of P.'s occupation and the termination of the qualifying period. No claim to be rated in respect of the said second house was made by P., nor did he make any tender or payment under sect. 30 of the Representation of the People Act, 1832, or sect. 30 of the Parliamentary Electors Registration Act, 1868, of the sum which would have been due had he been rated. The revising barrister held that P. was not entitled to have his name on the occupiers' list, and expunged his name therefrom.

HELD—that, as the house in question was not on the rate book during the qualifying period, P. was not entitled to the franchise.

Decision of Div. Ct. ([1909] 1 K. B. 227; 78 L. J. K. B. 282; 99 L. T. 858; 73 J. P. 97; 25 T. L. R. 56; 53 Sol. Jo. 62) affirmed.

PITTS *v.* MICHELMORE, [1909] 2 K. B. 244; 101 [L. T. 188; 73 J. P. 313; 25 T. L. R. 492; 7 L. G. R. 518; 2 Smith, Reg. 130—C. A.

9. *Inhabitant Occupier—Father as Sub-Tenant of Son of a Room in House Occupied by Son During Employment—Joint Occupancy—Representation of the People (Scotland) Act, 1868* (31 & 32 Vict. c. 48), s. 3.—*Representation of the People Act, 1884* (48 & 49 Vict. c. 3), ss. 2, 7 (4).]—A servant, in virtue of and conditionally on his employment, occupied a house in respect of which he was entered on the list of voters under the Representation of the People Act, 1884, s. 3. He, with his employer's sanction, sub-let one room in the house to his father, who claimed, under the representation of the People (Scotland) Act, 1868, s. 3, and the Representation of the People Act, 1884, ss. 2, 7 (4), to be entered in the roll of voters for the county as an inhabitant occupier as tenant.

HELD—that the claimant was not entitled to be entered in the roll of voters—*per* Lord Pearson and Lord Ardwall, on the ground that on the facts set forth he was a joint occupier of the house along with his son; and *per* Lord Johnston, on the ground that he was a lodger, not a tenant.

MILNE *v.* BRUNTON, [1909] S. C. 912; 46 Sc. [L. R. 229—Reg. App. Ct., Scotland.

**VII. OWNERSHIP VOTERS.**

[No paragraphs in this vol. of the Digest.]

**VIII. REVISING BARRISTERS.***See also* VI., *supra*.

10. *Admissibility of Evidence—Objection to Voter—Hearsay Evidence in Support of Claim—Appeal—Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), ss. 41, 65.*—A person claimed to have his name inserted in Division I. of the Occupiers' List in respect of his occupation in succession of two dwelling-houses. Notice of intention to oppose the claim was duly given. In support of the claim entries made in a canvasser's book were admitted in evidence, although there was nothing to show who gave the information contained therein. The revising barrister admitted the claim. He was not called upon to decide, and did not decide, whether the evidence given was legal evidence, but stated a case as to whether such evidence was properly admitted. The Divisional Court held that the Court, by virtue of the provisions of s. 65 of the Parliamentary Voters Registration Act, 1843, was precluded from entertaining the appeal.

**HELD**—that the revising barrister was bound to apply his mind to the consideration of the question whether the evidence before him was admissible as legal evidence or not whenever such question arose, and that the appeal must be allowed.

Decision of Div. Ct. (26 T. L. R. 123) reversed.

*STOREY v. TOWN CLERK OF BERMONDSEY*, [128 L. T. Jo. 172; *Times*, December 17th, 1909—C. A.]

**IX. SERVICE FRANCHISE.**

[No paragraphs in this vol. of the Digest.]

**X. MISCELLANEOUS.**

11. *Scotch University—Women Graduates—Right to Vote—Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), s. 27—Universities (Scotland) Act, 1889 (52 & 53 Vict. c. 55).*—Women graduates of Edinburgh and St. Andrews Universities are not entitled to the Parliamentary franchise.

Decision of Ct. of Sess. ([1908] S. C. 113; 45 Sc. L. R. 122) affirmed.

*NAIRN v. UNIVERSITY COURT OF UNIVERSITY* [OF ST. ANDREWS AND OTHERS, [1909] A. C. 147; 78 L. J. P. C. 54; 100 L. T. 96; 25 T. L. R. 160; 53 Sol. Jo. 161; [1909] S. C. (H. L.) 10; 46 Sc. L. R. 132—H. L.]

**ELECTRIC LIGHTING, TRACTION, AND POWER.****I. CONTRACT FOR SUPPLY.**

[No paragraphs in this vol. of the Digest.]

**II. GENERALLY.**

[No paragraphs in this vol. of the Digest.]

*And see* HIGHWAYS.**EMBEZZLEMENT.***See* CRIMINAL LAW AND PROCEDURE.**EMBLEMENTS.***See* AGRICULTURE; LANDLORD AND TENANT; REAL PROPERTY.**EMIGRATION.***See* SHIPPING AND NAVIGATION.**EMPLOYERS' LIABILITY.***See* MASTER AND SERVANT.**ENDOWMENT.***See* CHARITIES; ECCLESIASTICAL LAW.**EQUITABLE ASSIGNMENT.***See* CHUSES IN ACTION; MORTGAGES.**EQUITY.**

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**I. UNCONSCIONABLE BARGAINS.***See* MONEY AND MONEYLENDERS.**II. UNDUE INFLUENCE.**

1. *Husband and Wife—Joint and Several Promissory Note—Influence of Husband—Presumption.*—*Semble*, there is no presumption of law that a transaction between a husband and wife cannot stand unless the fullest evidence is given to negative any impropriety in the transaction.

Decision of Jelf, J. (25 T. L. R. 171) affirmed.

*HOWES v. BISHOP AND WIFE*, [1909] 2 K. B. [390; 78 L. J. K. B. 796; 100 L. T.; 25 T. L. R. 533—C. A.]

**ESTATE AGENT.**

*See* AGENCY; AUCTIONS AND AUCTIONEERS; SALE OF LAND; VALUERS AND APPRAISERS.

## ESTATE DUTY.

See DEATH DUTIES.

## ESTATE TAIL.

See REAL PROPERTY.

## ESTOPPEL.

See also INFANTS, No. 3; LANDLORD AND TENANT, No. 4; LIBEL, No. 5.

1. *Estoppel against Estoppel—Patent Infringement Action—Judgment for Plaintiff and Inquiry as to Damages—Patent Revoked before Inquiry.*]

*Per Parker, J.:* *Quere* whether there is any rule that an estoppel against an estoppel sets the matter at large.

In a patent infringement action the plaintiff obtained judgment for an injunction and inquiry as to damages. The defendants soon afterwards on fresh evidence of prior user obtained an order revoking the patent.

HELD—that the judgment estopped the defendants from setting up the invalidity of the patent upon the inquiry as to damages.

Decision of *Parker, J.* (77 L. J. Ch. 586; 24 T. L. R. 717) affirmed.

POULTON v. ADJUSTABLE COVER AND BOILER [BLOCK CO., LD., [1908] 2 Ch. 430; 77 L. J. Ch. 780; 99 L. T. 647; 24 T. L. R. 782; 52 Sol. Jo. 639; 25 R. P. C. 661—C. A.

2. *Res judicata—Previous Action for Damages between Same Parties—Same Evidence Maintainable in Both Actions—Costs Incurred in Action against Third Party—Consequential Damages—Not Claimed in Previous Action.*—*H. Brothers* sent a vessel to the plaintiffs to be overhauled. As the vessel's refrigerating machinery was out of order the plaintiffs employed the defendants to do the necessary work upon it. Under their contract with *H. Brothers* the plaintiffs were liable to a penalty in the event of the work not being completed within a specified time. Owing to an accident, due to the negligence of the defendants' workmen, the work was not completed within the time specified. In 1906 the defendants sued the plaintiffs for work done and material supplied in respect of the refrigerating machinery of the vessel in question, and the plaintiffs in turn sued *H. Brothers* for the balance of their account for work done. *H. Brothers* admitted the claim for work done, but counter-claimed from the plaintiffs £618 for penalties for the work not being completed within the specified time. The plaintiffs in their action with the defendants counter-claimed the sum of £618 for penalties alleged to be due to *H. Brothers*. At the trial of these actions judgment was given for *H. Brothers* for £500, and for the plaintiffs against the defendants for the

same amount. In their action against *H. Brothers* the plaintiffs incurred costs to the amount of £525 6s. 11d., but the plaintiffs did not put forward any claim in their action in 1906 with the defendants in respect of these costs. The plaintiffs now sought to recover the amount of these costs from the defendants.

HELD—that the action failed inasmuch as the plaintiffs could have claimed and recovered in the previous action the costs now sued for and the matter was *res judicata*.

FURNESS, WITHY & CO., LD. v. J. AND E. HALL, [LD., 25 T. L. R. 233—Channell, J.

3. *Res Judicata—Construction of Will—Decision Unappealed From.*—The Court cannot review a previous decision of the same question between the same parties arising in a case which was not appealed from at the time, and which is no longer open to appeal.

Where, in 1872, the Court declared that certain gifts of annual sums were void and fell into undevoted residue, and in 1891 in another suit the Court declared that the trustees of the will were estopped from disputing that they were wholly undisposed of:—

HELD—that the decision of 1872, being on the construction of the will, applied to the corpus and not only to the annual sums and was *res judicata*.

BADAR BEE v. HABIB MERICAN NOORDIN, [[1909] A. C. 615; 78 L. J. P. C. 161; *sub nom.* TENGACHEE NACHAR v. HABIB MERICAN NOORDIN AND OTHERS, 101 L. T. 161—P. C.

See S. C. under DEPENDENCIES, No. 36.

## EVIDENCE.

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## I. IN GENERAL.

## (a) Admissibility.

1. *Handwriting—Opinion of Person Not an Expert.*—The signature of a transferor to a transfer may be proved by the evidence of a person who is not an expert in handwriting, but who has received documents written by the person whose signature is in question, although the latter is in Court and the attesting witness is available.

IN RE CLARENCE HOTEL, ILFRACOMBE, LD., 54  
[Sol. Jo. 117—Eve, J.]

## (b) Affidavits.

[No paragraphs in this vol. of the Digest.]

## (c) Miscellaneous.

2. *Corroboration—Joint Claim against Deceased Person's Estate.*—It is a rule of law, and not an imputation of untruthfulness, that a joint claim by two persons against the estate of a deceased person cannot be maintained unless there is independent corroboration in addition to what is supplied by each of the claimants giving the same testimony as the other.

VAVASSEUR v. VAVASSEUR, 25 T. L. R. 250—  
[Channell, J.]

3. *Subpœna—Power to Set Aside—Improper Motives—Minister of Crown.*—The High Court has jurisdiction both in civil and criminal cases to set aside a subpœna served on a witness, if satisfied that he cannot give relevant evidence, and that the subpœna has been served on him for some ulterior purpose.

Subpœnas served on Ministers of the Crown were set aside on these grounds, but Ministers have no special privilege from the obligation of obeying a subpœna.

R. v. BAINES AND ANOTHER, [1909] 1 K. B. [258; 78 L. J. K. B. 119; 100 L. T. 78; 72 J. P. 524; 25 T. L. R. 79; 53 Sol. Jo. 101—Div. Ct.]

4. *Practice—Two Witnesses on same Side Contradicting each Other.*—When two equally credible witnesses called by one side contradict each other, it is not competent for the party calling them to seek to discredit one and accredit the other.

SUMNER AND LEIVESLEY v. JOHN BROWN  
[& Co., 25 T. L. R. 745—Hamilton, J.]

5. *Interested Party—Corroboration.*—Where the evidence given by an interested party is corroborated in a substantial matter, it confirms the credit not only of the statements expressly supported, but also of all statements made by the interested party.

MINISTER OF STAMPS v. TOWNEND, [1909] A. C. [633; 101 L. T. 354—P. C.]

## II. DOCUMENTS.

See also DEPENDENCIES, No 17.

## (a) In General.

6. *Latent Ambiguity in Will—Extrinsic Evidence—Instructions for Will in Testator's*

*Handwriting—Admissibility.*—A document in the testator's handwriting consisting of instructions for his will, written contemporaneously with the preparation of the will, is admissible in evidence to explain a latent ambiguity in the will, where the document is tendered, not for the purpose of proving an intention independent of or inconsistent with the will, but with the object of determining the sense in which the testator has used the word or words as to which the ambiguity arises.

Whether the document would be admissible if it were in the handwriting of some person other than the testator, *quære*.

*Bernasconi v. Atkinson* (10 Hare, 345) and *In re Feltham's Trusts* (1 K. & J. 528) considered and applied.

Decision of Eady, J. reversed.

IN RE OFNER, SAMUEL v. OFNER, [1909] 1 Ch. [60; 78 L. J. Ch. 50; 99 L. T. 813—C. A.]

7. *Map—Reputation—Public Highway.*—On an appeal against an order of justices refusing to alter a provisional apportionment made under the Private Street Works Act, 1892, quarter sessions refused to admit certain old maps which were tendered as evidence to show that the road in question was a highway repairable by the inhabitants at large.

HELD—that the maps were admissible as evidence of reputation that the road in question was a highway repairable by the inhabitants at large, if there was evidence that they amounted to declarations by deceased persons who had competent means of knowledge as to the facts.

VYNER v. WIRRAL RURAL DISTRICT COUNCIL,  
[73 J. P. 242; 7 L. G. R. 628—Div. Ct.]

8. *Subpœna duces tecum—Disobedience—Meaning of Word "Document"—Sealed Packet—Deposit with Banker—Duty of Banker.*—For the purposes of a *subpœna duces tecum* a sealed packet may be a "document." The fact that a document has been deposited with a bank by two persons on the terms that it is not to be given up without the consent of both is no answer to a subpœna served on an officer of the bank to produce the document before a magistrate in a criminal proceeding.

The Court may enforce obedience to a *subpœna duces tecum* by attachment, even though the disobedience is not wilful.

R. v. Lord John Russell ((1839) 7 Dowl. P. C. 693) explained.

R. v. DAVE, [1908] 2 K. B. 333; 77 L. J. K. B. [659; 99 L. T. 165; 72 J. P. 269; 21 Cox, C. C. 659—Div. Ct.]

## (b) Certificates.

9. *Certificate of Notary Public—Execution of Deed in Australia—Signature of Notary—Payment out of Funds in Court—R. S. C., Ord. 38, r. 6.*—A certificate signed and sealed by a notary public which, on a petition for payment out of funds in Court, is produced as evidence of the execution of a deed in Australia, whereby a life interest in the funds in Court is released, comes within the words "or any other

### II. Documents—Continued.

document" in Order 38, r. 6, and the signature or the notary public need not be verified by an affidavit.

IN RE DAVIES, DAVIES v. ATKINSON, [1909] W. N. 212—Eady, J.

#### (c) Entries in Books, Reports, etc.

See LIMITATION OF ACTIONS, No. 9.

#### (d) Public Documents.

10. *Objection to Production by Public Department—Prejudice to the Public Service.*—When a public department objects to the production of documents on the ground that the production of such documents would be prejudicial to the public service, the Court will not order their production even when the public department is pursuer in the action.

ADMIRALTY v. ABERDEEN TRAWLING CO., [1909] S. C. 335; 46 Sc. L. R. 254—Ct. of Sess.

11. *Privilege—Reports of Prison Medical Officer.*—The reports of the medical officer of a prison in the course of his duty to the governor of the prison are not privileged from production.

LEIGH v. GLADSTONE AND OTHERS, 26 T. L. R. [139—Lord Alverstone, C.J.]

### III. PERPETUATING TESTIMONY.

[No paragraphs in this vol. of the Digest.]

### IV. PRESUMPTION.

#### (a) Of Death.

12. *Grant of Administration—Widow Refusing to Apply—Grant to Creditors—Practice.*—W. disappeared from his home on May 13th, 1905, and about midnight on the arrival at Calais of the mail-boat certain articles belonging to him were found on deck, while he himself was "missing." W. had been in financial difficulties, and had left a letter suggesting his intention to commit suicide. W.'s widow and daughter declined to apply for administration, the widow having stated that she had heard that W. was still alive. On an application by W.'s bankers for a grant of administration to them as creditors,

The Court gave the applicants leave, if they ascertained the mail-boat's hour of arrival, to file an affidavit that they believed W. died on May 13th or 14th, 1905, as the case might be, and on proof of notice of motion being served on W.'s widow and daughter, to take a grant of administration as creditors.

IN THE GOODS OF WALKER, [1909] P. 115; [78 L. J. P. 50; 25 T. L. R. 278—Barnes, Pres.]

#### (b) Generally.

[No paragraphs in this vol. of the Digest.]

## EXCISE.

See INTOXICATING LIQUORS: REVENUE.

## EXECUTION.

See also BANKRUPTCY: COMPANIES, No. 40; COUNTY COURTS, No. 3; CRIMINAL LAW, No. 54; HUSBAND AND WIFE, No. 9; JUDGMENT, No. 1; LANDLORD AND TENANT, No. 7; RECEIVERS.

1. *"Sum Exceeding £20"—Levy on Goods for more than £20 to Cover Expenses—Execution Discharged by Payment of Less than £20—Obligation to Retain Money Paid to Avoid Sale for Fourteen Days—Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11 (2).*—Where, on an execution by the high bailiff, the money which is paid to avoid sale of the goods seized, and which discharges the execution, is less than £20, there is no "execution in respect of a judgment for a sum exceeding £20" within the meaning of sect. 11 (2) of the Bankruptcy Act, 1890, although the high bailiff has previously levied on goods for more than £20 to cover the possible expenses of "possession money" and the costs which might have been incurred for appraisement and sale of the goods, and therefore the high bailiff need not retain the money so paid for fourteen days in accordance with the terms of that section.

WILLEY v. HUCKS, [1909] 1 K. B. 760; 78 L. J. [K. B. 513; 100 L. T. 333; 53 Sol. Jo. 288; 16 Mans. 106—Div. Ct.]

2. *Writ of Fi. Fa. Issued after Debt Paid—Seizure of Goods—Damages for Trespass—Absence of Malice.*—No action for trespass lies against a defendant who without malice and in ignorance has issued a writ of *fi. fa.* after the debt in respect of which it was issued has been paid, there being no irregularity in the writ itself.

CLISSOLD v. CRATCHLEY AND ANOTHER, 128 L. T. [Jo. 152; 44 L. J. N. C. 766—Div. Ct.]

## EXECUTORS AND ADMINISTRATORS.

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**I. EXECUTORS GENERALLY.**

1. *Rights of Executors—Residue Undisposed of—No Next of Kin—Legacies to All Executors—Specific Bequests to Two Executors—Rights of Executors to Residue.*—A testator by his will appointed three executors and gave them each a legacy of £1,000, and in addition he gave to one executor his foreign decorations and to another his diamond ring and his gold watch. The residuary personal estate was not disposed of by the will, and the testator died without leaving any next of kin.

HELD—that the three executors took the residue beneficially. In such a case the executors take beneficially unless the will shows a contrary

intention, and, where there is any inequality in the gifts to two or more executors, no contrary intention is to be presumed, as it is when there is a gift of a pecuniary legacy to a sole executor or of equal gifts to all executors.

Decision of C. A. ([1908] 1 Ch. 552; 77 L. J. Ch. 326; 98 L. T. 486; 24 T. L. R. 340; 52 Sol. Jo. 279) affirmed.

ATTORNEY-GENERAL v. JEFFERYS, [1908] A. C. [411; 77 L. J. Ch. 685; 99 L. T. 737; 24 T. L. R. 793; 52 Sol. Jo. 660—H. L.]

2. *Rights of Executors—Imperfect Gift—Money not Identified—Promise to Pay in the Future—Continuing Intention to Give—Donee Appointed Executrix.*—The testator promised in writing that after a named future date the plaintiff should receive £2 a week, and died without altering his intention that the plaintiff should have this sum. He appointed the plaintiff one of his executors. The sum not having been paid regularly, she claimed the balance from the estate as an imperfect gift, perfected by her acquiring the legal ownership of the estate as executrix.

HELD—that the principle laid down in *Strong v. Bird* ((1874) L. R. 18 Eq. 315; 43 L. J. Ch. 814; 30 L. T. 745; 22 W. R. 788—Jessel, M.R.) is not to be extended to a case where the alleged gift was merely a promise to give in the future a sum of money not identified nor separated from the rest of the testator's estate.

In *re Stewart*, *Stewart v. McLaughlin* ([1908] 2 Ch. 251; 77 L. J. Ch. 525; 99 L. T. 106; 24 T. L. R. 679—Neville J.) distinguished.

IN RE INNES, INNES v. INNES, [1909] W. N. 238; [101 L. T. 633—Parker, J.]

**II. GRANT OF LETTERS OF ADMINISTRATION.**

See also EVIDENCE, No. 12.

**(a) Administration Bonds.**

3. *Dispensing with Sureties—Executors of Executrix—Advertisement for Creditors—Sum to be Retained for a Year—Probate Act, 1857 (20 & 21 Vict. c. 77), s. 81.*—A wife, being left the sole executrix and universal legatee and devisee of her husband's will, died a few days later without proving the will. Her executrix, after advertising for creditors of the husband's estate, paid all his known debts and funeral expenses, which together amounted to about £76, his estate being over £16,000.

On the wife's executors undertaking to retain for one year the sum of £300 out of the husband's assets to meet possible claims, administration of his estate with the will annexed was granted on their personal bond without sureties.

IN THE ESTATE OF HARPER, [1909] P. 88; 78 [L. J. P. 33; 100 L. T. 196—Deane, J.]

**(b) As on an Intestacy.**

[No paragraphs in this vol. of the Digest.]

**(c) Citation.**

[No paragraphs in this vol. of the Digest.]

**(d) Creditors.**

4. *Grant with Will Annexed to Creditor by Assignment.*—Where executors renounced pro-



## II. Grant of Letters of Administration—Continued.

bate, the Court granted administration *cum testamento annexo* to the assignee of a debt due by the testator to a creditor.

IN THE GOODS OF R. L. COSH, DECEASED, 25 [T. L. R. 785; 53 Sol. Jo. 755—Bigham, Pres.]

### (e) Crown's Rights.

[No paragraphs in this vol. of the Digest.]

### (f) Cum Testamento Annexo.

5. *Legatees in Trust—No Direction to Pay Debts—No Executors Appointed—Form of Grant.*—A testatrix by will left all her estate of the value of £2,200 to two persons in trust to pay the income to her husband for life, and she directed that after his death her estate was to be divided equally among her four children. There was no appointment of executors, and no direction to pay debts.

HELD—that the persons named as trustees were not, in the absence of a direction to pay debts, executors according to the tenor, and that the proper form of grant was one with the will annexed to them as universal legatees in trust.

IN THE ESTATE OF MACKENZIE, [1909] P. 305; [26 T. L. R. 39—Deane, J.]

### (g) De Bonis Non.

6. *Outstanding Grant—Further Grant to Second Applicant—Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 74.*—Letters of administration had been granted to a son of a deceased woman, who was entitled to a share of an estate being administered in the Chancery Division. Her personal representative was a necessary party, but the son's whereabouts had ceased to be known. The Court allowed a further grant to go under sect. 74 of the Court of Probate Act, 1857, to her daughter—the only other next of kin—on the applicant swearing the belief that her brother was dead or beyond the seas, and also undertaking to pay into Court the share her brother would be entitled to if alive.

IN THE GOODS OF ELLEN SAKER, DECEASED, [1909] P. 233; 78 L. J. P. 85; 101 L. T. 400; 53 Sol. Jo. 562—Deane, J.]

### (h) Foreigners.

[No paragraphs in this vol. of the Digest.]

### (i) Limited Grants.

[No paragraphs in this vol. of the Digest.]

### (k) Passing Over.

7. *Grant to Mother Passing over Father.*—The Court granted administration to the mother of the intestate as a creditor, passing over the father.

IN THE GOODS OF ANNIE MAY POTBURY, [DECEASED, 25 T. L. R. 440—Bigham, Pres.]

### (l) Presumption of Death of Next of Kin.

[No paragraphs in this vol. of the Digest.]

### (m) Renunciation by Next of Kin.

8. *Right to Retract Renunciation—Practice.*—A husband renounced his right to a grant

of administration to his wife's estate, and such renunciation was duly lodged and filed. Shortly afterwards he desired to revoke his renunciation and intimated his intention to do so to the solicitors acting for a creditor of the deceased, but they nevertheless carried in the papers into the Probate Registry and applied for and obtained a grant of administration to their client as a creditor, passing over the husband.

HELD—that the husband's renunciation having been duly lodged and filed, the Registrar was bound to act upon it, as it had not been withdrawn in the proper way, namely, by an application to the Court for leave to do so.

Decision of Deane, J. (100 L. T. 863; 25 T. L. R. 572) affirmed.

MELVILLE v. ANCKETILL, 25 T. L. R. 655—C. A.

### (n) Revocation of Grant.

9. *Grant Obtained by Fraud—Indian Assets—Revocation of Grant—Bonâ fide Purchaser of Assets from Administrator—Indian Succession Act, 1865 (Act X. of 1865), ss. 234, 262.*—Revocation under sect. 234 of the Indian Succession Act, 1865, of the grant of letters of administration operates only from the date of the order of revocation.

A testator died in England in 1898, having by his will devised and bequeathed all his property to the plaintiffs upon certain trusts. Among other property the testator had shares in the Bank of Bengal, the certificates of which were in the hands of his agent in Calcutta. The plaintiffs did not become aware of the existence of these shares till 1903, when they discovered that the testator's agent in Calcutta had in 1902 by means of a forged power of attorney obtained from the Court of Calcutta a grant of letters of administration to the testator's property in India, and that, purporting to act as administrator, he had sold and transferred to the defendant certain of the shares in the Bank of Bengal. The defendant was a *bonâ fide* purchaser for value without notice. In 1904 the grant of letters of administration to the testator's agent was revoked and fresh letters of administration, with the will annexed, were granted to the Administrator-General of Bengal for the benefit of the plaintiffs. In an action by the plaintiffs for a declaration that they were entitled to recover from the defendant the shares in question:—

HELD—that the action failed, as under the Indian Succession Act, 1865, the sale by the supposed administrator to the defendant was valid.

ELLIS v. ELLIS ([1905] 1 Ch. 613; 74 L. J. Ch. 296; 53 W. R. 617; 92 L. T. 727—Warrington, J.) distinguished.

CRASTER v. THOMAS, [1909] 2 Ch. 348; 78 [L. J. Ch. 734; 101 L. T. 66; 25 T. L. R. 659—Neville, J.]

## III. PROBATE.

### (a) Costs.

10. *Will Propounded by Plaintiff Pronounced against—Costs out of the Estate.*—The plaintiff.

## III. Probate—Continued.

a niece of the testator, propounded a will and two codicils. The defendant, a natural daughter of the testator, propounded a later will, as to which the plaintiff pleaded, *inter alia*, that it had been obtained by the undue influence of the defendant and her husband. The jury found in favour of the will propounded by the defendant on all the issues.

**HELD**—that the circumstances attending the inception and execution of the will propounded by the defendant were such as to justify and require the investigation made by the plaintiff, and, therefore, that the costs of both parties should come out of the estate, except the costs of the plea of undue influence, which should be paid by the plaintiff to the defendant.

LEVY v. LEO, 25 T. L. R. 717—Bigham, Pres.

**11. Reasonable Grounds for Inquiry—Costs Out of Estate.**—In a probate action, the Court being of opinion that there were reasonable grounds for an inquiry:—

**HELD**—that the defendant was entitled to his general costs out of the estate, but that, having pleaded undue influence without any justification and failed, he must pay the costs of that part of the case.

OLDCORN AND ANOTHER v. TENNISWOOD, 25 [T. L. R. 825—Bigham, Pres.

## (b) Effect.

[No paragraphs in this vol. of the Digest.]

## (c) Executor according to the Tenor.

[No paragraphs in this vol. of the Digest.]

## (d) Executor Misdescribed.

[No paragraphs in this vol. of the Digest.]

## (e) Foreign Wills.

See POWERS, No. 4.

## (f) Lost Will.

**12. Will Accidentally Destroyed—Press Copy of Copy of Will.**—The testatrix died in 1872, and her estate being valueless probate of her will was not applied for. The plaintiff, her executor, locked the will in his safe, and in 1873 caused his clerk to make a copy of the contents of the will in copying ink, from which a number of copies were made, and the original copy, having become spoilt, was destroyed. In 1883 a fire occurred at the plaintiff's premises, and the safe and its contents, including the will of the testatrix, were destroyed. The plaintiff stated that he had a clear recollection of the original will and its contents, and he was able to speak with certainty as to the handwriting of the testatrix and of one of the attesting witnesses, and that the signature of the second attesting witness was not in the same handwriting as that of the other two names. Both of the attesting witnesses were dead. Certain property having fallen in to the testatrix's estate, it became necessary to propound her will. The Court granted probate of a press copy of the copy of the will, subject to certain clerical errors which had been made by the plaintiff's clerk in copying.

LAFONE v. GRIFFIN, 25 T. L. R. 308—Bigham, Pres.

## (g) Practice.

**13. Propounder Benefiting by Will which he has Drafted—Burden of Proof—Knowledge of Testatrix.**—Where a plaintiff propounds a will which he has drafted for the testatrix and under which he benefits to a large extent, the burden is on him of proving that the document in question did really express the mind and intention of the testatrix, that she was conscious when she executed it, that it really was her will, and that she meant it to be the expression of her mind and intention.

Barry v. Butlin (2 Moo. P. C. 480), Fulton v. Andrews (L. R. 7 H. L. 448), and Tyrrell v. Painton ([1894] P. 151) followed and applied.

FINNY v. GOVETT AND OTHERS, 25 T. L. R. [186—C. A.

**14. Summons—Service—Length of Notice—Probate (Contentious) Rules, 1862, r. 100—R. S. C., Ord. 54, r. 4 (e)—Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 16, 23—Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 18.**—A rule in force in the Court of Probate at the time of the commencement of the Judicature Act, 1875, is not repealed or annulled by the making of a rule of the High Court dealing with the same subject-matter which does not expressly apply to the Probate Division.

By rule 100 of the Rules of the Court of Probate, 1862, a summons in a probate action is to be served one clear day before the return thereof.

**HELD**—that this rule is still in force, and is unaffected by R. S. C., Ord. 54, r. 4 (e), which requires two clear days' notice to be given.

IN RE HAILSTONE, HOPKINSON v. CARTER, [1909] P. 118; 78 L. J. P. 55; 100 L. T. 420; 53 Sol. Jo. 321.—C. A.

**15. Torn Will—Missing Words—Paper Annexed to Will.**—Where a torn will is admitted to probate, missing words will not be read into the will by the Court, but when proved may be contained in a paper attached to the will.

GILL AND ANOTHER v. GILL AND ANOTHER [AND THE OFFICIAL SOLICITOR, [1909] P. 157; 78 L. J. P. 60; 100 L. T. 861; 25 T. L. R. 400; 53 Sol. Jo. 359—Deane, J.

## (h) Revocation of Probate.

See also WILLS, Nos. 1, 4.

**16. Practice—Affidavits to Lead Citation and Writ—Plaintiff Temporarily Out of Jurisdiction—Application for Leave for Plaintiff's Solicitor to Swear Affidavits.**—Application for leave for the plaintiff's solicitor to swear the necessary affidavits to lead the citation and writ in an action for revocation of probate—the plaintiff being temporarily out of the jurisdiction—refused.

IN THE ESTATE OF R. LUKE, DECEASED, 25 [T. L. R. 825; 53 Sol. Jo. 734—Bigham, Pres.

#### IV. PAYMENT OF DEBTS AND DISTRIBUTION OF ESTATE.

##### (a) Conveyance of Real Estate.

17. *Mortgage by Executor being also Residuary Legatee—Charge on Property for Legacy to Another—Rights of Legatee.*—A testator, who died in 1885, by his will left all his property to his four sons by his first wife, subject to a charge for a legacy in favour of his four sons by his second wife. The legacy remained unpaid. The four elder sons in 1890 deposited the title deeds of part of the property with a bank as a security for an advance, and, in 1889, they executed a form of mortgage of the property to the bank. The bank, if they had made an investigation of title, would have obtained cognisance of the will which created the charge. The mortgagors practised no concealment.

HELD—that as the four younger sons were legatees and not merely creditors and as the bank had constructive notice of the charge, the claim of the four younger sons must prevail over the mortgage of the bank.

*Graham v. Drummond* ([1896] 1 Ch. 968; 65 L. J. Ch. 472; 74 L. T. 417; 44 W. R. 596; 12 T. L. R. 319—*Romer, J.*) distinguished.

THE BANK OF BOMBAY AND ANOTHER *v.* [SULEMAN SOMJI AND OTHERS, L. R. 35 Ind. App. 130; 99 L. T. 532; 24 T. L. R. 840; 52 Sol. Jo. 727—*P. C.*]

##### (b) Insolvent Estate.

[No paragraphs in this vol. of the Digest.]

##### (c) Payment of Debts.

See also CLUBS, No. 2.

18. *Affiliation Order—Death of Putative Father—Arrears of Maintenance Unpaid—Claim for Arrears against Putative Father's Estate—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4.*—Where an affiliation order has been made directing the putative father of an illegitimate child to pay a weekly sum to the mother for the maintenance of such child, and the father dies leaving arrears of the sum unpaid, the mother cannot recover such arrears, or any accruing payments from the father's estate.

IN RE HARRINGTON, WILDER *v.* TURNER. [1908] 2 Ch. 687; 78 L. J. Ch. 27; 99 L. T. 723; 72 J. P. 501; 25 T. L. R. 3; 52 Sol. Jo. 855; 21 Cox, C. C. 709—*Warrington, J.*

19. *Capital and Income—Lump Sum payable by Instalments for Occupation of House—Death of Tenant before Instalments Paid—Defraying Part of Debts out of Income.*—Where a testator agreed to pay a lump sum by instalments for the occupation of a house, and died before the instalments were paid:—

HELD—that they were payable out of capital.

The rule in *Allhusen v. Whittell* (1867) L. R. 4 Eq. 295, *Wood, V.-C.* does not apply to an absolute gift with executory gift over.

IN RE HANBURY, COMISKEY *v.* HANBURY. [1909] [W. N. 157; 101 L. T. 32; 25 T. L. R. 654; 53 Sol. Jo. 616—*Eve, J.*]

##### (d) Payment of Legacies.

20. *Statute-barred Debt Due to Estate—Same Person Residuary Legatee of Debtor and Entitled to Share in Residuary Estate of Creditor—Bringing Debt into Account.*—A. was sole residuary legatee of a man who owed a statute-barred debt to B. A. was also entitled to a share in B.'s residuary estate.

HELD—that A. was in no sense a debtor to B.'s estate, and need not bring the debt into account.

*Courtenay v. Williams* ((1844) 3 Hare, 539; 15 L. J. Ch. 204) distinguished.

Decision of *Neville, J.* ([1908] 1 Ch. 850; 77 L. J. Ch. 434; 98 L. T. 834) reversed.

IN RE BRUCE, LAWFORD *v.* BRUCE, [1908] 2 Ch. [682; 78 L. J. Ch. 56; 99 L. T. 704—*C. A.*]

21. *Trust for Payment of Legacy in futuro—Legacy Duty—Interest on Legacy.*—The testator by his will, after providing for the sale and conversion of his residuary estate and the payment of his debts, certain legacies and annuities, and also all estate, legacy, and other duties payable in respect of his estate and in respect of the legacies and annuities payable under his will, directed that his trustees should, at such time or times, and from time to time as they should think fit, but nevertheless as soon after his death as circumstances would permit having regard to the amount of his residuary estate at his death and the facilities of sale and realisation, and having regard to the directions thereinbefore contained, set apart and appropriate out of the residue a sum as nearly as might be but not exceeding £1,000,000, to be held upon trust for the Whiteley Homes Trustees.

HELD—(1) that legacy duty in respect of the bequest to the Whiteley Homes Trustees was payable out of the residuary estate and not out of the legacy; and (2) that as the legacy was not payable at any definite time it carried interest from the end of a year after the testator's death.

Decision of *Eve, J.* (100 L. T. 920; 25 T. L. R. 543; 53 Sol. Jo. 503) affirmed.

IN RE WHITELEY, WHITELEY *v.* BISHOP OF [LONDON, 101 L. T. 508; 26 T. L. R. 16—*C. A.*]

22. *Legacy to Married Daughter—Daughter Dying before Testator—Time for Ascertaining Next of Kin—Notional Death—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 33.*—A testator by his will, made in 1871, devised freehold houses to trustees, upon trust for his wife for life, and after her death upon trust for sale and to stand possessed of the proceeds in trust, in the events which happened, for his two sons and his daughter, H. I. The testator died in 1902 and his widow in 1903. H. I., the wife of F. I., had two sons born in 1870, who survived the testator, H. I. died in 1876 and F. I. in 1899. The point at issue was whether the next of kin of H. I. were to be ascertained at her actual death in 1876, or at her notional death, under sect. 33 of the Wills Act, 1837, in 1902, immediately after that of her father.



#### IV. Payment of Debts and Distribution of Estate —Continued.

**HELD**—that sect. 33 of the Wills Act, 1837, applied, and H. I. must be deemed for the purposes of the legacy to have died immediately after the testator, her father, and that H. I.'s sons as her then next of kin were entitled to take out representation to her estate.

**IN RE ALLEN'S TRUSTS**, [1909] W. N. 181  
[—Neville, J.]

**23. Interest on Legacy—Date from which Payable.**—A testator left the income of his residuary estate to J. for her life, and directed his trustees at her death to convert into money his residuary estate and, after payment of testamentary expenses, to pay in the first place £1,000 free of duty to M. J. died within a month after the testator's death.

**HELD**—that the legacy to M. carried interest from the date of J.'s death, and not only from twelve months after the testator's death.

**IN RE WHITE, WHITE v. SHENTON**, 128 L. T. [Jo. 150—Joyce, J.]

#### (e) Possible Future Liabilities.

[No paragraphs in this vol. of the Digest.]

#### (f) Right of Retainer.

**24. Right to Retain Simple Contract Debt against Specialty Debt—Debt to Partnership—Hinde Palmer's Act**, 1869 (32 & 33 Vict. c. 46)—*R. S. C. Ord.* 48a, rr. 1 and 10.—An executor of an insolvent estate claimed to retain a simple contract debt due by the estate to a firm of which he was a partner against a specialty debt due by the estate to the defendant.

**HELD**—that the executor's right to retain a partnership debt was not affected by *R. S. C. Ord.* 48a, and that (the cases and practice of the Chancery Division for the last twenty years being followed with reluctance) the executor had no right to retain the simple contract debt against the specialty debt.

*Quære*, whether there is any distinction in principle between the executor's right to prefer creditors and his right to retain his own debt.

*In re Samson, Robbins v. Alexander* ([1906] 2 Ch. 584; 76 L. J. Ch. 21; 95 L. T. 633—C. A.) considered.

**IN RE JENNES, OETZES v. JENNES**, 53 Sol. Jo. [376—Neville, J.]

#### (g) Testamentary Expenses.

*See WILLS*, No. 34.

#### (h) Specific Legacies.

**25. Specific Legacy—Upkeep between Death of Testator and Assent by Executor—Liability of Legatee.**—The cost of the upkeep of a specific legacy between the death of the testator and the assent by the executor must be borne by the specific legatee and not by the residuary estate.

**IN RE PEARCE, CRUTCHLEY v. WELLS**, [1909] 1 Ch. 819; 78 L. J. Ch. 484; 100 L. T. 699; 25 T. L. R. 497; 53 Sol. Jo. 419—Eve, J.]

**26. Specific Legacy of Shares—Transfer by Executors—Discovery of Later Codicil—Revocation of Probate—Fresh Grant—Executors' Assent—Recovery of Intermediate Dividends.**—A testatrix by her will and codicils bequeathed specifically her shares in a company to two daughters and the trustees of a third daughter in three equal parts. The executors proved the will and codicils and transferred the shares to the two daughters, retaining those of the third daughter as her trustees. Three years afterwards a later codicil was discovered revoking the above bequest and bequeathing the shares in four equal parts to the three daughters and to a son, C. The original probate having been revoked, probate was granted afresh to the same executors, who assented to the four specific legacies. C. claimed to recover one fourth of the dividends on the shares since the testatrix's death as well as one fourth of the shares.

**HELD**—that the executors having assented to specific legacies, they vested in the actual legatees as from the testatrix's death, that the executors' assent could not be qualified so as to relieve the intermediate misapplication of dividends, and that, therefore, C. could recover at law the dividends paid to his sisters in respect of the shares to which he was entitled.

**IN RE WEST, WEST v. ROBERTS**, [1909] 2 Ch. [180; 78 L. J. Ch. 559; 101 L. T. 375—Eady, J.]

### V. POWERS AND LIABILITIES.

#### (a) Carrying on Business.

*See WILLS*, No. 44.

#### (b) Liabilities.

[No paragraphs in this vol. of the Digest.]

#### (c) Powers.

**27. Devise to Trustees upon Trust for Sale—Heirs of Trustees not Mentioned—Sale by Executors of last Surviving Trustee—No New Trustees Appointed—Conveyancing Act**, 1881 (44 & 45 Vict. c. 41), s. 30.—A testator devised real estate to his four executors, but without adding "and their heirs," upon trusts for sale with power to postpone sale and to lease. The will also declared that "my trustees" should signify the trustees or the trustee for the time being of the will. The executors of the last surviving trustee contracted to sell part of the estate, but the purchaser required that new trustees should be appointed to convey the property.

**HELD**—that sect. 30 of the Conveyancing Act, 1881, gave to the legal personal representatives no powers beyond those given to the heir, and that, as the heirs of the trustees were not mentioned in the will, the property could only be sold by the trustees named or by newly appointed trustees.

**IN RE CRUNDEN AND MEUX'S CONTRACT**, [1909] 1 Ch. 690; 78 L. J. Ch. 396; 100 L. T. 472  
—Parker, J.]

### VI. ACTION FOR ADMINISTRATION.

[No paragraphs in this vol. of the Digest.]

**EXECUTORY DEVISE.***See TRUSTS; WILLS.***EXHUMATION OF HUMAN REMAINS.***See BURIAL AND CREMATION.***EXPLOSIVES.***[No paragraphs in this vol. of the Digest.]***EXPULSION ORDER.***See ALIENS.***EXTORTION.***See CRIMINAL LAW.***EXTRADITION AND FUGITIVE OFFENDERS.***See also CRIMINAL LAW AND PROCEDURE.***EXTRAORDINARY TRAFFIC.***See HIGHWAYS.***FACTORIES AND WORKSHOPS.**

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**I. DEFINITIONS.**

1. "Factory"—*Adapting for Sale—Rag Sorting—“Shaker”*—*Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), s. 149. —On certain premises rags were sorted by hand, and, after being sorted, were sold wholesale to manufacturers of shoddy or manufacturers of paper. An exceedingly small proportion of the rags were occasionally passed through a "shaker" to remove dust and dirt, the "shaker" being driven by an electric motor, these rags being afterwards sorted by hand like the rest.

HELD—that, as this did not constitute a manufacturing process or an adapting for sale within the meaning of sect. 149 of the Factory and Workshop Act, 1901, the premises were not a factory within the meaning of that section.

PATERSON v. HUNT, 101 L. T. 571; 73 J. P. 496  
[—Div. Ct.]

**II. EMPLOYMENT.***[No paragraphs in this vol. of the Digest.]***III. MACHINERY.**

2. *Dangerous Machinery—Absence of Fencing—Bodily Injury—Limit of Time for Taking Proceedings—Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), ss. 135 (1), 136, 146 (1).—Sect. 135 of the Factory and Workshop Act, 1901, provides that if a factory is not kept in conformity with the Act the occupier shall be guilty of an offence. Sect. 136 provides that if any person suffers bodily injury in consequence of the occupier neglecting to observe any provision of the Act the occupier shall be guilty of an offence.

An information was laid on October 24th, 1907, by a factory inspector against the occupiers of a factory for not having a dangerous machine securely fenced, whereby a person suffered bodily injury on July 31st, 1907. The inspector had on January 21st, 1907, visited the factory and found the machine unfenced, and cautioned the manager. The occupiers neglected to fence the machine, and it was still unfenced on July 31st, 1907, and in consequence the person in question suffered bodily injury.

HELD—that the offence created by sect. 136 of the Act was an entirely separate offence from that created by sect. 135, and that, therefore, the proceedings were not out of time under sect. 146 (1), as the information had been laid within three months after the date at which the offence charged came to the knowledge of the inspector.  
R. v. TAYLOR, [1908] 2 K. B. 237; 77 L. J. K. B. [531; 98 L. T. 754; 72 J. P. 238; 21 Cox, C. C. 592—Div. Ct.]

3. *Unfenced Flywheel—Continuing Offence—Limitation of Time for Proceedings—Discovery of Offence—Factory and Workshop Act, 1901* (1 Edw. 7, c. 22), ss. 10, 17, 146.—The appellant, an inspector of factories, visited the respondents' factory in May, 1905, and, finding that the fly-wheel of an engine was not securely fenced as required by sect. 10 of the Factory and Workshop Act, 1901, he required them to fence it properly. He again visited the factory on March 12th, 1908,

**III. Machinery—Continued.**

and, finding that the same wheel was not securely fenced, he again required them to fence it. Finding it on a third visit on July 1st, 1908, still not securely fenced, he laid an information on July 22nd, 1908, against the respondents in respect thereof. The justices dismissed the information on the ground that the information had not been laid within three months after the date at which the offence came to the appellant's knowledge.

**HELD**—that there was a continuous series of offences in not securely fencing the flywheel; that the offence for which the respondents were convicted was discovered on July 1st, 1908; and that the justices were therefore wrong in dismissing the information on the ground that it had not been laid in time.

**VERNEY v. MARK FLETCHER AND SONS, LD.,**  
[1909] 1 K. B. 444; 78 L. J. K. B. 292;  
100 L. T. 348; 73 J. P. 131; 25 T. L. R. 248—  
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**IV. MEANS OF ESCAPE FROM FIRE.**

[No paragraphs in this vol. of the Digest.]

**V. SANITATION AND VENTILATION.**

[No paragraphs in this vol. of the Digest.]

**VI. UNDERGROUND BAKEHOUSES.**

[No paragraphs in this vol. of the Digest.]

**FACTORS.**

*See* AGENCY; BAILMENTS.

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*See* MARKETS AND FAIRS.

**FALSE IMPRISONMENT.**

*See* TRESPASS.

**FALSE PERSONATION.**

*See* CRIMINAL LAW AND PROCEDURE.

**FALSE PRETENCES.**

*See* CRIMINAL LAW AND PROCEDURE.

**FALSE STATEMENT.**

*See* ELECTIONS: MISREPRESENTATION;  
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**FALSE WARRANTY.**

*See* FOOD AND DRUGS.

**FALSIFICATION OF ACCOUNTS.**

*See* CRIMINAL LAW AND PROCEDURE.

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[No paragraphs in this vol. of the Digest.]

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*See* BOUNDARIES AND FENCES.

**FERÆ NATURÆ.**

*See* ANIMALS.

**FEROCIOUS ANIMAL.**

*See* ANIMALS; NEGLIGENCE.

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**FERTILIZERS AND FEEDING STUFFS.**

*See* AGRICULTURE.

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**FIRE, LIABILITY FOR.**

*See* NEGLIGENCE; RAILWAYS.



**FIREARMS.**

See CRIMINAL LAW.

**FIRE BRIGADE.**

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**FISHERIES.**

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I. UNLAWFUL ANGLING.	
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II. FISHING RIGHTS.	
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O'NEILL v. JOHNSTON, [1908] 1 I. R. 358— Ross, J.	
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III. SALMON FISHERY ACTS.	
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(a) Fishery Districts.	
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2. <i>Seawage Pollution—Nuisance—Common Law or Prescriptive Right to Discharge Sewage into</i>	
Y.D.	

*Sea.*—In answer to an action by the owner of an oyster fishery for an injunction to restrain a municipal corporation from discharging untreated sewage into tidal waters so as to pollute the plaintiff's oyster beds, the defendants pleaded that they had a right both at common law and by prescription to discharge their sewage into the sea.

HELD—on the authority of *Foster v. Warblington Urban District Council* ([1906] 1 K. B. 648; 75 L. J. K. B. 574; 70 J. P. 233; 54 W. R. 575; 94 L. T. 876; 22 T. L. R. 421; 4 L. G. R. 735—C. A.) that the defendants had no right to discharge sewage into the sea so as to cause a nuisance, and that an injunction ought to be granted.

Decision of Eve, J. (72 J. P. 404) affirmed.

OWEN v. FAVERSHAM CORPORATION, 73 J. P. [33—C. A.]

**V. SEA FISHERIES.**

[No paragraphs in this vol. of the Digest.]

**FIXTURES.**

See AGRICULTURE; BILLS OF SALE; DISTRESS; LANDLORD AND TENANT; MORTGAGES; REAL PROPERTY AND CHATTELS REAL.

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**I. SALE OF FOOD AND DRUGS ACTS.**

(a) Administration and Procedure.  
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I. Sale of Food and Drugs Acts—*Continued.*

## (b) Analysis.

1. *Milk—Analyst's Certificate—Certificate Obtained in Other Proceedings—Prosecution by a Member of the Public—Sale of Food and Drugs Acts, 1875 (38 & 39 Vict. c. 63), and 1899 (62 & 63 Vict. c. 51).*—*P.*, a retail dealer of milk, was prosecuted and convicted under the Sale of Food and Drugs Acts for selling adulterated milk. This milk was purchased by her innocently from a wholesale dealer named *B.*, and was sold by her in the same condition as she obtained it from *B.* *P.* brought a prosecution against *B.*, and gave in evidence the analyst's certificate that had been used in the prosecution against herself, but she did not obtain any certificate on her own behalf. No copy of any certificate was served on *B.* along with the summons. On a motion to make absolute a conditional order for *certiorari* to bring up and quash a conviction against *B.* :

HELD—the conviction must be quashed, as the analyst's certificate must be obtained by every prosecutor, whether private or official.

*R. (BARRY) v. MAHONY*, [1909] 2 I. R. 490; 43 [I. L. T. 263—Div. Ct., Ireland.

2. *Milk—Sample bearing Wrong Date—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 14.*—A farmer having been convicted of an offence under the Sale of Food and Drugs Acts, inasmuch as he had sold milk defective in quality, brought a suspension on the ground that the sample analysed, upon which the conviction had been obtained, bore the date of the day preceding the day of the alleged offence.

HELD—that as the only object of the date on the sample was identification, and as the question of the identification of the sample analysed with that purchased from the accused was a question of fact, which could not be reopened, the bill of suspension must be refused.

*HOWE v. KNOWLES*, [1909] S. C. (J.) 61; 46 [Sc. L. R. 881—Ct. of Justy.

## (c) Offences.

3. *Sale to Prejudice of Purchaser—Paregoric Asked For—Substitute Supplied—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), ss. 6, 8.*—The servant of the respondent, who was a chemist, on being asked by the appellant for paregoric, sold to him a substance containing only half the amount of alcohol which should be present in a genuine sample of paregoric, and containing no tincture of opium, which is an essential constituent according to the formula given in the British Pharmacopœia. The bottle was labelled "Paregoric—Poison," but the word "poison" had been struck out in pencil and the word "substitute" added in pencil. On the hearing of an information against the respondent under sect. 6 of the Sale of Food and Drugs Act, 1875, for selling paregoric not of the nature, substance, and quality demanded, it was proved that paregoric was not sold because the respondent's servant, being an unqualified

assistant, could not sell poison without committing an offence against the Pharmacy Acts.

HELD, on the special facts—that there was no sale to the prejudice of the purchaser, and that therefore the respondent had not committed the offence charged.

*BUNDY v. LEWIS*, 99 L. T. 833; 72 J. P. 489; [7 L. G. R. 55—Div. Ct.]

4. *Milk—Refusal to Sell to Inspector—Skimmed Milk—Requirement of Label—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 17—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 11.*—The appellant was summoned under sect. 17 of the Sale of Food and Drugs Act, 1875, for refusing to sell to an inspector for the purpose of analysis, milk which he (the appellant) was exposing for sale. The inspector had asked for new milk out of a particular can, and the appellant thereupon upset all the milk from it into the road. The can contained skimmed milk which the appellant alleged he was about to deliver to persons who were his regular customers for skimmed milk. The can did not bear any label or mark stating that it contained skimmed milk.

HELD—that the can did not require to be labelled "skimmed milk," as sect. 11 of the Sale of Food and Drugs Act, 1899, does not apply to milk carried round for sale in an ordinary can, but only to condensed milk, and that as there was no evidence that the appellant was exposing the milk for sale as new milk he could not be convicted.

*FRENCH v. CARD*, 101 L. T. 428; 73 J. P. 389; [7 L. G. R. 890—Div. Ct.]

5. *Coffee—Adulteration—Mixture of Chicory and Coffee—Label—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6.*—The appellants were summoned for selling to the prejudice of the purchaser coffee adulterated with 74 per cent. of chicory. It was proved that an inspector on asking for half a pound of coffee was supplied, at the price of 11*d.*, with half a pound of a mixture of which 74 per cent. was chicory and 26 per cent. was coffee, and with two coupons entitling him to certain other articles. The article sold was labelled "Coffee Mixture," with the words "Sold as a mixture of chicory and coffee," in small print. The inspector's attention was not drawn to the label prior to the sale. The magistrates held that the offence charged had been committed, and that as in their opinion the chicory had been added fraudulently to increase the weight and bulk of the article sold, the label afforded no protection to the appellants.

HELD—that there was evidence to justify this finding.

*STAR TEA CO. v. NEALE*, 73 J. P. 511—Div. Ct.

6. *Cream—Use of Preservatives—Injurious to Children and Invalids—Uninjurious to Adults—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 3.*—The appellant was convicted for selling, contrary to sect. 3 of the Sale of Food and Drugs Act, 1875, a pot of cream mixed with loric acid so as to render the

### I. Sale of Food and Drugs Act—Continued.

article injurious to health. The cream was sold as cream, and there was a statement on the label that the cream contained a small quantity of preservatives to retard sourness. No indication beyond the label was given to the purchaser as to the composition of the cream. It was proved that preserved cream was harmless to a normal adult in ordinary quantities when containing only a proportion of boracic acid to the extent contained in the sample of which complaint was made, namely, 0·313 per cent., but that it was injurious to the health of children and invalids.

HELD—that the justices having found as a fact that the cream was injurious to a substantial portion of the community, and no notice beyond that above indicated having been given to the purchaser as to the composition of the cream, the conviction must be affirmed.

CULLEN *v.* MCNAIR, 99 L. T. 358; 72 J. P. 376; [24 T. L. R. 692; 6 L. G. R. 753; 21 Cox, C. C. 682—Div. Ct.]

#### d) Taking Samples.

*See also* No. 2, *supra*.

7. *Procurement of Sample by Assistant Inspector—Proceedings by Inspector—Milk—Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3.*—An assistant inspector of weights and measures having by direction of the appellant taken a sample of milk in the course of its delivery by the respondents to the purchasers, the sample was submitted to the public analyst by the appellant, who was an inspector under the Sale of Food and Drugs Acts, and was found to be deficient in milk fat to the extent of about 9 per cent. An information was then laid against the respondents for selling the milk without disclosure of the alteration, the proceedings being instituted and carried on by and in the name of the appellant.

HELD—that as the appellant had procured the sample through the agency of the assistant inspector, the proceedings were rightly instituted and carried on by and in the name of the appellant.

TYLER *v.* DAIRY SUPPLY CO., LD., 98 L. T. [867; 72 J. P. 132; 6 L. G. R. 422; 21 Cox, C. C. 612—Div. Ct.]

#### (e) Warranties.

8. *Verbal Renewal of Contract to Supply Pure Milk—Nothing Said as to Quality—Delivery as Before—Similar Label Stating Milk to be Pure—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25.*—By a contract in writing dated December 7th, 1907, entered into between the appellant and a firm at Boscombe, the latter agreed to sell to the appellant a specified quantity of warranted pure new milk daily to March 31st, 1908. Between those dates milk was supplied to the appellant under that contract, and to each churn of milk delivered to him was attached a label stating *inter alia* that the milk

was pure new milk. After March 31st, 1908, the firm at Boscombe continued to supply the appellant under a verbal arrangement, nothing being said as to the quality of milk to be supplied, but to each churn supplied thereafter there was as before a label attached similar to that already mentioned, stating the milk to be pure new milk. In proceedings against the appellant under the Sale of Food and Drugs Act, 1875, the appellant relied on the label as a warranty. The magistrate convicted the appellant, being of opinion that the label attached to the churn did not form part of a contract between the appellant and the Boscombe firm, and that, therefore, it did not constitute a written warranty within sect. 25 of the Act.

HELD—that the label attached to each churn was a sufficient warranty, and that, therefore, the appellant was entitled to the protection of sect. 25 of the Sale of Food and Drugs Act, 1875.

LEWIS *v.* WEATHERITT, 100 L. T. 367; 73 J. P. [164; 25 T. L. R. 226; 7 L. G. R. 502—Div. Ct.]

### II. SALE OF UNSOUND MEAT.

#### (a) Generally.

[No paragraphs in this vol. of the Digest.]

#### (b) In London.

[No paragraphs in this vol. of the Digest.]

### III. SALE OF BREAD.

9. *Sale Otherwise than by Weight—"Fancy Bread"—Difference in Size and Shape but not in Quality—Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 4.*—To constitute "fancy bread" within the meaning of sect. 4 of the Bread Act, 1836, it is not essential that the bread sold under that description should differ in quality from ordinary bread. If bread is sold of a size and shape unmistakably different from an ordinary loaf, there is evidence on which justices can properly find that it is "fancy bread."

BAILEY *v.* BARSBY, [1909] 2 K. B. 610; 78 [L. J. K. B. 974; 100 L. T. 370; 73 J. P. 138; 25 T. L. R. 224; 7 L. G. R. 381—Div. Ct.]

10. *Time of Weighing—No Weighing in Presence of Customer—Previous Weighing with Reference to the Sale—Customer Getting Overweight—Bread Act, 1836 (6 & 7 Will. 4, c. 37), s. 4.*—The appellants, who were bakers and sellers of bread, were summoned for selling bread otherwise than by weight, contrary to sect. 4 of the Bread Act, 1836. It was proved that the man in charge of the appellants' shop had served a customer who asked for a 3d. best cottage loaf with a loaf which was not fancy bread, and for which she paid 3d. When the loaf was handed to the customer it had round it a band on which appeared the words: "Blackledge's fancy bread, 3d. and 1½d. per loaf (2d. per lb.) always overweight, varying according to fluctuations in price of flour." The loaf was not weighed in the presence of the customer, but it in fact weighed 1 lb. 11½ oz., and at some time before the customer entered the shop it had been weighed and the band had been placed round it by the



### III. Sale of Bread—Continued.

manager of the shop. In the ordinary course of business, each morning the manager weighed each loaf himself, and if it exceeded 1½ lbs. put on it a band similar to the one in question. There was no dispute that at the price charged the loaf need not have weighed more than 1 lb. 8 oz.

HELD—that the Act was not meant to prevent people from getting a few ounces overweight, and that, there having been a weighing with reference to the sale, the appellants had committed no offence.

BLACKLEDGE AND SONS, LD. *v.* BOLSHAW, 72 [J. P. 383; 99 L. T. 60; 24 T. L. R. 696; 6 L. G. R. 885; 21 Cox, C. C. 648—Div. Ct.]

11. *Time of Weighing—Weighing in Reference to Sale—Bread Act, 1836* (6 & 7 Will. 4, c. 37), s. 4.]—The respondent was summoned under sect. 4 of the Bread Act, 1836, for selling bread otherwise than by weight. It was proved that the loaf in question had been weighed by the respondent on being taken out of the oven, and that it was a 2 lb. loaf, but, being of a bad shape, it was put aside for consumption in the respondent's house and was sold by mistake by the respondent's brother-in-law, acting on behalf of the respondent. At the time of the sale, which took place about twelve hours after the loaf had been weighed, the loaf weighed 1½ oz. under 2 lbs., the loss in weight being due to evaporation. The loaf was not weighed in the presence of the purchaser before it was sold.

HELD—that there ought to have been a weighing in reference to the sale, and that as on the above facts there had been no weighing in reference to the sale, there had been a sale otherwise than by weight, and therefore the respondent ought to be convicted.

*Cox v. Bleines* ([1902] 1 K. B. 670; 71 L. J. K. B. 437; 86 L. T. 563; 66 J. P. 407; 50 W. R. 392; 18 T. L. R. 356—Div. Ct.) explained. *MATTINSON v. BINLEY*, 77 L. J. K. B. 832; 99 [L. T. 53; 72 J. P. 346; 24 T. L. R. 671; 6 L. G. R. 760; 21 Cox, C. C. 636—Div. Ct.]

12. *Time of Weighing—Weighing in Reference to Sale—Bread Act, 1836* (6 & 7 Will. 4, c. 37), s. 4.]—The appellant was summoned for selling bread otherwise than by weight, contrary to sect. 4 of the Bread Act, 1836, and it was proved that the respondent, who was an inspector of weights and measures, having asked the man in charge of the appellant's bread van for a 2 lb. loaf, the vanman took a loaf and, on the respondent's asking what it weighed, tried to weigh it, but the weights available only enabled him to ascertain that it weighed less than 2 lb., and the weight of the bread was not ascertained. It was proved that the vanman had been instructed to tell purchasers other than regular customers that the loaves usually sold as 2 lb. loaves were not guaranteed to be more than 1½ lb., that a man named Lewis, who was also employed by the appellant, weighed each loaf separately every morning before it was sent out in the van, and if any loaf was found not to turn the scale

at 1½ lb., it was not sent out. It was given in evidence that Lewis weighed all the loaves on the day in question before they were delivered to the vanman.

HELD—that as the loaf had never been weighed in reference to a sale of a 2 lb. loaf, the appellant was properly convicted.

*EVANS v. JONES*, 99 L. T. 799; 72 J. P. 481; [25 T. L. R. 5; 6 L. G. R. 1166—Div. Ct.]

### IV. MARGARINE.

13. *Adulteration—Certificate of Analyst—Sufficiency of—Margarine—Sale of Food and Drugs Act, 1875* (38 & 39 Vict. c. 63), s. 18, and *Sched.*; and 1899 (62 & 63 Vict. c. 51), s. 1—*Butter and Margarine Act, 1907* (7 Edw. 7, c. 21), s. 5.]—In proceedings for an offence against sect. 1 of the Sale of Food and Drugs Act, 1899, as extended by sect. 5 of the Butter and Margarine Act, 1907, the certificate of analysis by the principal chemist of the Government laboratories, under sect. 1, sub-sect. 5, of the Act of 1899, need not follow the form of the certificate of analysis prescribed by sect. 18 and the schedule of the Sale of Food and Drugs Act, 1875.

*FOOT v. FINDLAY*, [1909] 1 K. B. 1; 78 L. J. [K. B. 48; 99 L. T. 798; 72 J. P. 494; 25 T. L. R. 10; 53 Sol. Jo. 32; 6 L. G. R. 1129—Div. Ct.]

14. *Definition—New Substance—Imitation of Butter—Margarine Act, 1887* (50 & 51 Vict. c. 29), s. 3.]—The definition of margarine in sect. 3 of the Margarine Act, 1887, includes any substance prepared in imitation of butter, although it contains no animal fat and was unknown when that Act was passed.

All such substances must be sold as margarine and under the special conditions prescribed by the Act.

*WILKINSON v. ALTON*, 99 L. T. 119; 72 J. P. [252; 24 T. L. R. 528; 52 Sol. Jo. 457; 6 L. G. R. 544; 21 Cox, C. C. 635—Div. Ct.]

### FORBEARANCE.

*See* CONTRACT; GAMING AND WAGERING.

### FORCIBLE ENTRY AND DETAINER.

*See* LANDLORD AND TENANT.

### FOREIGN ATTACHMENT.

*See* PRACTICE AND PROCEDURE.

**FOREIGN ENLISTMENT.***See* CRIMINAL LAW.**FOREIGN JUDGMENT.***See* CONFLICT OF LAWS.**FOREIGN LAW AND FOREIGNERS.***See* CONFLICT OF LAWS**FOREIGN STATE, ACTION BY.***See* ACTION.**FORESHORE.***See* WATER AND WATERCOURSES.**FORFEITURE.***See* CRIMINAL LAW; FISHERIES; LANDLORD AND TENANT; REAL PROPERTY; SETTLEMENTS; WILLS.**FORGERY.***See* BANKERS AND BANKING; CRIMINAL LAW.**FRANCHISE.***See* ELECTIONS; FERRIES; FISHERIES; MARKETS AND FAIRS; REAL PROPERTY.**FRAUD.***See* ACTION; CONTRACT; LIMITATION OF ACTIONS; MISREPRESENTATION AND FRAUD; PLEADING; TRUSTS; WILLS, No. 4.**FRAUDS, STATUTE OF.***See* CONTRACT; SALE OF GOODS; SALE OF LAND.**FRAUDULENT AND VOIDABLE CONVEYANCES.***See* AGENCY; BANKRUPTCY; SETTLEMENTS.**FREEBOARD.***See* SHIPPING AND NAVIGATION.**FREEMAN.***See* LOCAL GOVERNMENT.**FREIGHT.***See* SHIPPING AND NAVIGATION.**FRIENDLY SOCIETIES.**

COL.

**I. REGISTERED SOCIETIES.**

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**III. UNREGISTERED SOCIETIES** . . . 236*See also* CLUBS; INDUSTRIAL SOCIETIES.**I. REGISTERED SOCIETIES.****(a) Disputes.**

[No paragraphs in this vol. of the Digest.]

**(b) Dissolution.**

1. *Objects Exhausted—Disposal of Surplus Funds—Bona vacantia—Resulting Trust—Cypres—Friendly Societies Act, 1792* (33 Geo. 3, c. 54), s. 14.]—A benefit society established in 1808 consisted of honorary members who were subscribers not entitled to receive any relief from its funds and of benefited members who received certain instruction, paid certain fees, and were entitled to specified relief in sickness or in old age. Poverty was not a necessary qualification for membership. The society ceased to have any practical existence in 1845, when the school of industry in connection with it was closed. Only two benefited members now

**I. Registered Societies—Continued.**

remained entitled to small annuities. Five persons claimed to be honorary members. The trustees brought this action to ascertain who were entitled to the surplus funds.

**HELD**—that by sect. 14 of the Friendly Societies Act, 1792, the donations by honorary members were the property of the society and there was no resulting trust in their favour, that the annuitants had no interest in the surplus funds beyond the annuities they had contracted for; that the funds were not clothed with any charitable trust so as to justify their application *ex-parte*, and that the surplus funds fell to the Crown as *bona vacantia*.

**BRAITHWAITE v. ATTORNEY-GENERAL**, [1909]

[1 Ch. 510; 78 L. J. Ch. 314; 100 L. T. 599; 73 J. P. 209; 25 T. L. R. 333—Eady, J.]

**(c) Nomination of Life Policy.**

[No paragraphs in this vol. of the Digest.]

**(d) Officers.**

**2. Debt Due to Society from Treasurer—Bankruptcy after ceasing to be Treasurer—Preferential Payment—Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 34, 35.**—Under sect. 35 of the Friendly Societies Act, 1896, the trustees of a friendly society are, upon the bankruptcy of the person who was treasurer of the society, entitled to be paid out of his estate the balance due from him to the society in respect of moneys he has received on its behalf, notwithstanding that at the date of his bankruptcy he has ceased to be an officer of the society.

*In re Miller* ([1893] 1 Q. B. 327) applied.

**IN RE EILBECK, EX PARTE TRUSTEES OF THE [GOOD INTENT LODGE, No. 978, OF THE GRAND UNITED ORDER OF ODDFELLOWS, [1909] W. N. 246; 101 L. T. 688; 26 T. L. R. 111; 54 Sol. Jo. 118—Phillimore, J.]**

**(e) Rules.**

[No paragraphs in this vol. of the Digest.]

**(f) Generally.**

**3. Conversion into Company—Special Resolution—Assent of Members—Objects of Company—Exceeding the Scope of the Objects of the Society—Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), ss. 8, 70 (3), 71, 74.**—A friendly society registered under the Friendly Societies Act, 1896, by special resolution at meetings convened in manner provided for by its rules, but without any attempt to obtain the assent of a very large number of its members, resolved to convert itself into a company limited by guarantee under a memorandum and articles of association, which altered the position of members of the society and which extended and substantially altered the nature of the objects of the society, both as defined by its own rules and as restricted by the Friendly Societies Act, 1896, s. 8.

**HELD**—that the society could not, under the guise of conversion into a company in pursuance of sect. 71 of the Friendly Societies Act, 1896, by a mere special resolution as defined in sect. 74, and without the assents required by sect. 70,

sub-sect. 3, be transformed into a company with quite different objects and constituted quite differently from the society.

**BLYTHER v. BIRTLEY**, [1909] W. N. 252; 26 [T. L. R. 115; 54 Sol. Jo. 101—Joyce, J.]

**II. COLLECTING SOCIETIES AND INDUSTRIAL ASSURANCE COMPANIES.**

[No paragraphs in this vol. of the Digest.]

**III. UNREGISTERED SOCIETIES.**

**4. Slate Club—Unregistered Association of More than Twenty Persons—Liability of Persons Receiving Subscriptions to Account—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 1.**—Where an association is formed of more than twenty persons who are to contribute sums of money to be applied in relieving cases of sickness, &c., amongst them, the balance being distributable among the members at the end of each year, the persons inviting and receiving the subscriptions and managing the affairs of the association are trustees of the amounts received by them to the extent that they are liable to account, but, *quære*, whether they are so liable on the footing on which trustees are ordinarily liable to account. Such an association is not an illegal association within sect. 1 of the Companies (Consolidation) Act, 1908.

*Quære*, whether, even if the association were illegal, the Court could not interfere in the interests of the subscribers.

**IN RE ONE AND ALL SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION**, 25 T. L. [R. 674—Parker, J.]

**FUGITIVE OFFENDERS.**

*See* EXTRADITION.

**GAME.****I. GAME.**

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**II. SPORTING RIGHTS, ETC.**

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*See also* CRIMINAL LAW, No. 56

**I. GAME.****(a) Ground Game.**

[No paragraphs in this vol. of the Digest.]

**(b) Licences.**

[No paragraphs in this vol. of the Digest.]

**(c) Trespass and Poaching.**

**1. Seizure of Partridge Eggs by Police-constables under Statutory Power—Proceedings taken**



## I. Game—Continued.

*under Different Statute—Conviction Quashed—Restoration of Game or Value thereof—Detinue—Trovee—Game Act, 1831 (1 & 2 Will. 4, c. 32), s. 24—Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2.*—The defendants, who were police-constables purporting to act under sect. 2 of the Poaching Prevention Act, 1862, seized 564 partridge eggs which they found in the possession of the plaintiff's servant, but instead of proceeding as directed by that Act, they took out a summons under sect. 24 of the Game Act, 1831, against the plaintiff and his servant. The plaintiff was fined 2s. an egg, or £56 8s. in all, a far higher penalty than could have been inflicted under sect. 2 of the Act of 1862. The conviction was subsequently quashed. Thereupon the plaintiff sued the defendants in detinue for the eggs or their value, with an alternative claim in trovee.

**HELD**—that the "value" to be restored within the meaning of sect. 2 of the Act of 1862 is not the value of the game when it was seized, but the value "when no conviction takes place," *i.e.*, in the case under consideration, when the conviction was quashed; but that the plaintiff was entitled to recover, inasmuch as sect. 24 of the Game Act, 1831, gives no power to seize eggs, and the Poaching Prevention Act, 1862, only allows a police-constable to search for and seize eggs if proceedings by him in respect thereof are contemplated and taken under that Act.

**STOWE v. BENSTED AND ANOTHER.** [1909] 2 K. B. 415; 78 L. J. K. B. 837; 101 L. T. 38; 73 J. P. 370; 25 T. L. R. 546; 53 Sol. Jo. 543—Div. Ct.

*2. Unlawful Possession of Eggs—Evidence—Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), s. 2.*—The appellant having been summoned for being in possession of game eggs unlawfully obtained, evidence was given on behalf of the prosecution that a constable, having seen the appellant in the month of May under circumstances of suspicion with other men, searched the appellant's cart and found a large number of game eggs which the appellant stated came off his own farm. No evidence was called on behalf of the appellant.

**HELD**—that the appellant was rightly convicted of an offence within sect. 2 of the Poaching Prevention Act, 1862.

**STOWE v. MARJORAM,** 101 L. T. 569; 73 J. P. [498—Div. Ct.]

## II. SPORTING RIGHTS, ETC.

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## GAMING AND WAGERING.

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And see CRIMINAL LAW: INTOXICATING LIQUORS.

## I. GAMING CONTRACTS.

See also No. 13, *infra*.

*1. Money Lent for Gaming Abroad—Right to Recover—Gaming Acts, 1710 (9 Anne, c. 14), s. 1, and 1835 (5 & 6 Will. 4, c. 41), s. 1.*—Money lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the Courts of this country.

**Quarrier v. Colston** (1 Phillips, 147) followed.

Decision of **Bray, J.** (99 L. T. 92; 24 T. L. R. 856) affirmed.

**SAXBY v. FULTON,** [1909] 2 K. B. 208; 78 L. J. [K. B. 781; 101 L. T. 179; 25 T. L. R. 446; 53 Sol. Jo. 397—C. A.]

*2. Betting Debts—Cheque—"Given" for Illegal Consideration—Further Consideration—Counter-Cheque for Smaller Amount—Gaming Acts, 1710 (9 Anne, c. 14), s. 1, and 1835 (5 & 6 Will. 4, c. 41), s. 1.*—The plaintiff was induced by the fraud of L. to give her a cheque for £3,000, payable to her order for the alleged purpose of a good investment. L. at the time owed the defendant £1,400 for betting debts, and she endorsed the cheque for £3,000 over to him in exchange for a counter-cheque of his own for £1,600. There was no evidence that the defendant acted in bad faith or that there was anything in the nature of the transaction to put him upon inquiry. The cheque for £3,000 was paid by the defendant into his banking account, and the counter-cheque for £1,600 was endorsed and cashed by L. The plaintiff claimed to recover the £1,400 from the defendant as money had and received to her use.

**HELD**—that the plaintiff was not entitled to recover.

Decision of **Ridley, J.** (25 T. L. R. 722) affirmed.

**BARKWORTH AND ANOTHER v. GANT,** 26 T. L. R. [165—C. A.]

*3. Betting Debts—Forbearance to Declare Defendant a Defaulter—New Contract—Fresh Consideration—Gaming Acts, 1835 (5 & 6 Will. 4, c. 41), s. 1, and 1845 (8 & 9 Vict. c. 109), s. 18.*—The defendants owed the plaintiffs a sum of £137 13s. 8d. in respect of bets. When asked for payment the defendants stated that they could not pay. The plaintiffs threatened to post the defendants as defaulters at Tattersall's, whereupon the defendants promised that if they were given a week's time they would pay. To that the plaintiffs agreed, but no payment was in fact made by the defendants. The defendants were not members of Tattersall's.

**HELD**—that the plaintiffs were entitled to recover as there was consideration for the promise by the defendants to pay the debt on the threat by the plaintiffs to post them as defaulters.

**M. COHEN & Co. v. ULPH & Co.,** 25 T. L. R. [710—Bucknill, J.]

**HELD** on Appeal—that there was no question of law before the Court, and that Bucknill, J.'s, finding of fact should not be interfered with.

26 T. L. R. 128—C. A.

## II. GAMES AND GAMING HOUSES.

4. *Using House for Unlawful Gaming—Slot Machine—Playing for Amusement—Gaming Houses Act, 1854* (17 & 18 Vict. c. 38), s. 4.]—The appellant kept in his shop an automatic machine with a slot in it. A person desirous of working the machine put a halfpenny in the slot, then pulled a lever which caused a ball to be thrown to the top of the machine. If the ball came back into one cup the halfpenny was returned to the player; if it went into another the ball was returned to the player to be played again; and if it went into a third cup the halfpenny became the property of the appellant. A large number of persons used the machine in the shop. The appellant was convicted by the justices of using his shop for the purpose of unlawful gaming contrary to sect. 4 of the Gaming Houses Act, 1854.

HELD—that the conviction was right.

ROBERTS v. HARRISON, [1909] W. N. 163; 101 [L. T. 540; 73 J. P. 439; 25 T. L. R. 700—Div. Ct.]

## III. BETTING HOUSES AND BETTING.

5. *Betting—Loitering in Street for Purpose of Betting—Distributing Handbills Relating to Betting—Street Betting Act, 1906* (6 Edw. 7, c. 43), s. 1.]—The respondent was charged under the Street Betting Act, 1906, with having loitered in a certain highway for the purpose of betting. It was proved that the respondent was distributing in a public street handbills which contained offers by bookmakers to receive bets. The magistrate, being of opinion that the distribution of such handbills in the street did not come within the terms of the Act, dismissed the charge.

HELD—that the magistrate ought to have convicted, inasmuch as the respondent in distributing the handbills was doing a substantial part of the business of betting by indicating to the public the terms on which the bookmakers were prepared to bet and the means by which the bets could be carried out.

DUNNING v. SWETMAN, [1909] 1 K. B. 774; 78 [L. J. K. B. 359; 100 L. T. 604; 73 J. P. 191; 25 T. L. R. 302—Div. Ct.]

6. *Betting—Loitering for the Purpose of Settling Bets—Second Offence—What is—Previous Conviction not under same Statute—Using Street for Betting—Bye-law—Street Betting Act, 1906* (6 Edw. 7, c. 43), s. 1 (1).]—To entitle justices to convict as for a second offence under sect. 1 of the Street Betting Act, 1901, the previous offence must have been an offence under the same statute and not one under (e.g.) a bye-law against street betting.

R. v. STONE, EX PARTE SETON, 99 L. T. 88; [72 J. P. 388; 21 Cox, C. C. 653—Div. Ct.]

7. *Betting on Horse-races—Gaming—Licensing Act, 1872* (35 & 36 Vict. c. 94), s. 17 (1).]—Betting upon horse-races does not come within the meaning of the term "gaming" in sect. 17 (1) of the Licensing Act, 1872.

KEEP v. STEVENS, 100 L. T. 491; 73 J. P. 112 [—Div. Ct.]

8. *Public-house Used for Betting—Not with Knowledge of Licensee—Permission of Person assisting in Management—Betting Act, 1853* (16 & 17 Vict. c. 119), ss. 1, 3.].—A. used a public-house for the purpose of betting with persons resorting thereto. He did this with the knowledge and connivance of B., the licensee's son, who assisted the licensee in conducting the business of the public-house. The licensee was present in and managing the public-house, but the justices held that the offence charged against her was a personal offence, and dismissed the summons against her because they were not satisfied upon the evidence that she knew that betting was going on. The justices convicted A. of using the public-house for the purpose of betting with persons resorting thereto, and convicted B. of aiding and abetting A. to commit the offence.

HELD—that, as B. was in fact assisting in conducting the business of the public-house, he was a person clothed with the licensee's authority who could give permission to A. to use the premises for the purpose of betting with persons resorting thereto; that no distinction could in this case be drawn between being in charge and assisting in the management of the public-house; and that the conviction of A. and B. was therefore right.

R. v. DEARVILLE ([1903] 1 K. B. 468; 72 L. J. K. B. 272; 67 J. P. 82; 51 W. R. 604; 88 L. T. 32; 19 T. L. R. 223; 20 Cox, C. C. 389) explained and distinguished.

BUXTON AND ANOTHER v. SCOTT, 100 L. T. 390; [73 J. P. 133; 25 T. L. R. 239—Div. Ct.]

9. *Using House for Betting—Isolated Instance—Evidence—Licensing Act, 1872* (35 & 36 Vict. c. 94), s. 17.].—An information was laid against the appellant, a licensed innkeeper, under sect. 17 of the Licensing Act, 1872, for using his licensed house and premises for the purpose of betting with persons resorting thereto, in contravention of the Betting Act, 1853. The evidence was that a man on one occasion went into the house and saw the appellant and gave him 2s., and asked him as a favour whether he would put 1s. each way on "Lady Hasty" for him for the "Cambridgeshire" if he (the appellant) was going to Wolverhampton. The man got no ticket or receipt for the money.

HELD—that this being an isolated instance there was no evidence that the appellant was using his house for the purpose prohibited by the Betting Act, 1853, and that he therefore could not be convicted.

JAYES v. HARRIS, 99 L. T. 56; 72 J. P. 364; [21 Cox, C. C. 639—Div. Ct.]

10. *Using Public Place for Betting—"Frequenting and Using"—"Public Place"—Access by Payment—Bye-law.*]—A bye-law prohibited the frequenting and using of a public place for the purpose of betting. By the definition section of the bye-law a public place included *inter alia* any open space to which the public had access for the time being. The appellant was convicted under the bye-law for having attended at an athletic ground to which the public had access

**III. Betting Houses and Betting—Continued.**

on payment of an entrance fee, and made bets there.

**HELD**—that the word “frequenting” meant being sufficiently long in the place to effect the object aimed at, namely, to bet, and that the athletic ground was a “public place” notwithstanding that a payment had to be made to gain admission.

**AIRTON AND ANOTHER v. SCOTT**, 100 L. T. 393; [73 J. P. 148; 25 T. L. R. 250—Div. Ct.]

**11. Betting—Publishing Advertisement Inviting Public to Bet with Another Person Resident Abroad—Betting Act, 1853** (16 & 17 Vict. c. 119), ss. 1, 3, 7—**Betting Act, 1874** (37 Vict. c. 15), s. 3.]—A. was charged with a contravention of the Betting Acts, 1853 and 1874, by publishing advertisements, in a street, inviting the public to bet on football matches with B., who was resident in Holland, and to whom any money staked by members of the public was to be sent by them by post.

**HELD**—that under the statutes the publishing of advertisements inviting the public to bet, although done by persons other than the one with whom the bet was to be made, and to whom the money staked in respect thereof was to be paid, was an offence under the Acts, and, consequently, that the complaint set forth a relevant charge against A.

**AGNEW v. MORLEY**, [1909] S. C. (J.) 41: 46 [Sc. L. R. 640—Ct. of Justy.]

**IV. LOTTERIES.**

**12. Limited Company—Publishing Proposal and Scheme for Sale of Chances—“Person”—Punishment as Rogue and Vagabond—Lotteries Act, 1823** (4 Geo. 4, c. 60), ss. 41, 62, 67—**Summary Jurisdiction Act, 1879** (42 & 43 Vict. c. 49), s. 4—**Interpretation Act, 1889** (52 & 53 Vict. c. 63), s. 2.]—A limited company which publishes a proposal scheme for the sale of chances in an unauthorised lottery cannot be convicted as rogues and vagabonds under the Lotteries Act, 1823.

**HAWKE v. E. HULTON & Co., LD.**, [1909] 2 K. B. 93; 78 L. J. K. B. 633; 100 L. T. 905; 73 J. P. 295; 25 T. L. R. 474; 16 Manson, 164—Div. Ct.]

**13. Limerick Competition—Advertisement of Competitions—Claim for Price of Advertisements—Gaming Act, 1802** (42 Geo. 3, c. 119), s. 5—**Lotteries Act, 1836** (6 & 7 Will. 4, c. 66), s. 1.]—The defendants employed the plaintiffs in connection with advertising the conditions of certain “Limerick” competitions, and also the terms of a letter-writing competition in which the public were invited to complete a letter containing blank spaces by adding the missing words. In addition to prizes offered for the best lines, every competitor sending in a line by a certain date was to receive a prize worth a guinea. Consolation prizes were also to be awarded. It was stated in the conditions that every line would be judged entirely on its merits. The plaintiffs, having arranged and paid for the

insertion of these advertisements, sued the defendants to recover the money they had so paid, and their commission.

**HELD**—that the competitions advertised were lotteries; that in advertising them the plaintiffs committed an illegal act; and, therefore, that the plaintiffs were not entitled to recover.

**SMITH'S ADVERTISING AGENCY v. LEEDS [LABORATORY Co.]**, 26 T. L. R. 64—Walton, J.

**GARNISHEE ORDERS.**

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**GAS.**

GAS COMPANIES AND SUPPLY OF GAS. COL.

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PUBLIC HEALTH.

(a) In General.

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(b) Mains, Pipes, and Lamps.

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**GIFTS.**

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II. DONATIO MORTIS CAUSA.

(a) Subject Matter . . . . . 243

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I. IN GENERAL.

See also EXECUTORS, No. 2: MISTAKE,  
No. 4.

**1. Validity—Statements by Father to His Daughters that They would get Proceeds of Policies on his Life—Declaration of Trust—Joint Claim against Deceased Person's Estate—Corroboration.**]—In 1902 a father told his two unmarried daughters, the plaintiffs, that they would be entitled on his death to the proceeds of certain policies of insurance effected on his life, and on many subsequent occasions he repeated this statement and told them how they would be able to obtain the money after his death. The father had made his will in 1897, but it contained no mention of the policies, nor were they mentioned in a codicil which he executed in



### I. In General—Continued.

1906. After their father's death the plaintiffs claimed the proceeds of the policies.

HELD—that the claim failed, as there was neither (1) a gift by the deceased of the proceeds of the policies, but at the most a promise to make a gift, nor (2) a declaration of trust by the deceased in favour of the plaintiffs.

HELD FURTHER—that the action also failed on the ground that, being a claim against the estate of a deceased person, the plaintiffs' testimony required corroboration, and there was no such corroboration.

VAVASSEUR *v.* VAVASSEUR, 25 T. L. R. 250—  
[Channell, J.]

2. *Gift or Loan—Promissory Note—Absolute Renunciation—Letter of Pledge to Third Party—Statement that Amount was a Gift absolutely—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 62.*—J. D., being anxious to start his son-in-law, P. J., in business, banded to him £500 and received a promissory note, dated October 31st, 1906, signed by P. J. P. J. in reply to inquiries by wholesale houses, stated to them that the £500 was a gift from J. D. The manager of a wholesale house with whom P. J. had opened an account wrote to him in March, 1907, saying that firms had inquired of them whether J. D. had confirmed the gift, and asking him to get a letter from J. D. stating that the £500 was free from any liability to J. D. On April 3rd, 1907, J. D. sent a reply to the manager's letter, stating that the £500 "was a gift absolutely." J. D. died on April 15th, 1907, and P. J. paid one half-year's interest on the promissory note, and, becoming aware of the letter of April 3rd, 1907, refused to pay the principal.

HELD—that there had been a renunciation of the right which the promissory note would otherwise have conferred on the executors of J. D.

IN RE DICKINSON, DICKINSON *v.* LUCAS, 101  
[L. T. 27—Eve, J.]

## II. DONATIO MORTIS CAUSA.

### (a) Subject matter.

3. *Funds in the Hands of Trustee—Gift of a Balance.*—Where a dying person tells a trustee what to do with certain funds in the hands of the trustee, in the event of her death, this is sufficient to constitute a valid *donatio mortis causa*. In such a case the donation may be of a balance remaining in the hands of the trustee, after the payment out of certain charges of uncertain amount.

MURPHY *v.* QUIRKE, 43 I. L. T. 225—Kenny, J.,  
[Ireland.]

### (b) Validity.

4. *Packet "to be forwarded in due season"—Delivery—Gift in Expectation of Death.*—A. when eighty-six years of age and confined to bed by feebleness, although not really ill, handed to his servant a packet containing a promissory note and a memorandum of gift, and on the outer cover of the packet A. had written, "June 3rd, 1907, a present to Walter P. Inman, care of Miss

Ada Clarke [A.'s servant], to be forwarded in due season. It would be well to register the enclosed." A. told his servant to put the packet in a safe place, and she put it in a safe in A.'s house. A. died in October, 1907.

HELD—that the gift did not constitute a valid *donatio mortis causa*, inasmuch as (1) the evidence did not establish that the gift was made in expectation of death, and (2) as there had been no delivery to the donee or to any agent for him.

IN RE KIRKLEY, CORT *v.* WATSON, 25 T. L. R.  
[522—Joyce, J.]

5. *Delivery through Medium of a Third Party.*—In a *mortis causa* donation delivery need not be made to the donee personally, but may be made through the medium of a third party.

PRENTICE (HUTCHIESON'S EXECUTRIX) *v.*  
[SHEARER, [1909] S. C. 15; 46 Sc. L. R. 15—  
Ct. of Sess.]

## GOODWILL.

See PARTNERSHIP; SALE OF GOODS;  
TRADE, No. 9.

## GROUND GAME.

See GAME.

## GROUND RENTS.

See LANDLORD AND TENANT; REAL  
PROPERTY AND CHATTELS REAL;  
SALE OF LAND.

## GROWING CROPS.

See AGRICULTURE; BILLS OF SALE;  
LANDLORD AND TENANT; SALE OF  
LAND.

## GUARANTEE.

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See also BILLS OF EXCHANGE, No. 3;  
STOCK EXCHANGE, No. 3.

### I. IN GENERAL.

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### II. DISCHARGE OF SURETY.

1. *Joint and Several Guarantee—Bank Overdraft—Death of One Guarantor—Account Closed*

**II. Discharge of Surety—Continued.**

*—Demand for Payment—Right of Executors to have Liability discharged by Principal Debtor.]*

*—A. and other directors of the defendant company executed a joint and several continuing guarantee of the company's overdraft at its bankers. A. died, and subsequently the bankers wrote a letter to his executors stating that the balance due to the bank on the date when the bank received notice of A.'s death was £17,219, that the account had then been stopped and a new account opened, and that their claim against A.'s estate was therefore £17,219, with interest from the date on which the account was stopped. A.'s executors now brought this action against the company for a declaration that they and their testator's estate were entitled to be discharged of all liability under the guarantee by the payment by the company of the £17,219 with interest.*

**HELD**—that the bank had a present right of action against the plaintiffs for the £17,219, with interest, which they had in fact claimed by their letter, that in such circumstances the jurisdiction of the Court to grant relief was not limited to cases where the creditor had a right to sue the debtor which he had refused to exercise, and that the plaintiffs were entitled to the declaration asked for.

**ASCHERSON v. TREDEGAR DRY DOCK AND [WHARF Co., LD., [1909] 2 Ch. 401; 78 L. J. Ch. 697; 101 L. T. 519—Eady, J.**

**2. Arrangement with Creditors by Principal Debtor—Scheme—New Company—Novation—Release of Principal Debtor.]**—P. mortgaged certain property to a bank in the usual bankers' form, to secure overdrafts of a firm from time to time. Subsequently the bank agreed to a scheme whereby a new company took over all the assets and liabilities of the firm, and issued debenture stock to the bank and other creditors to the amount of the debts due to them from the firm, plus 25 per cent., in full discharge of all claims. The bank, in ascertaining the amount of their debt, deducted securities held on the firm's property, but did not take into account the mortgage on P.'s property.

**HELD**—that there had been complete novation and a release of the debt, and that consequently P., as surety, was discharged.

**PERRY v. NATIONAL AND PROVINCIAL BANK [OF ENGLAND, [1909] W. N. 261—Neville, J.**

**GUARDIAN AND WARD.**

*See INFANTS.*

**GUARDIANS OF POOR.**

*See POOR LAW.*

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*See GAME; REVENUE.*

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*See CROWN PRACTICE.*

**HABITUAL CRIMINAL.**

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## HIGHWAYS, STREETS, AND BRIDGES.

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## I. ORIGIN OF HIGHWAYS.

### (a) Adoption.

[No paragraphs in this vol. of the Digest.]

### (b) Dedication.

1. *Public User—Presumption—Competency of Dedicator—Settled Land—Tenancy for Life with Remainder in Fee—Churchway—Diversion—Limited Dedication.*—Where land settled upon a tenant for life with remainder in fee (both tenant for life and remainderman being *sui juris*) was under the control and management of the remainderman, who constructed across the land a road which he always treated as a public road, and since the date of its construction, more than sixty years ago, the user of the road by the public had been such as would have warranted a presumption of dedication as against an owner in fee in possession, but it did not appear that the tenant for life, who had been dead for fifty years, ever had any knowledge of the user of the road by the public.

**HELD**—that his consent must be presumed, and that the proper inference from the facts was that there had been a dedication to the public by the tenant for life and remainderman.

A landowner desiring to divert or improve a churchway by laying out a new road in substitution therefor, cannot confer on the public such rights only over the new road as existed over the churchway.

Decision of Warrington, J. ([1908] 2 Ch. 586 ; 72 J. P. 445) affirmed.

**FARQUHAR v. NEWBURY RURAL DISTRICT COUNCIL.** [1909] 1 Ch. 12 ; 78 L. J. Ch. 170 ; 100 L. T. 17 ; 25 T. L. R. 39 ; 73 J. P. 1 ; 53 Sol. Jo. 46 ; 7 L. G. R. 364—C. A.

2. *Railway Company—Superfluous Land—Disused Tramway—Power of Sale subject to*



# 1. Origin of Highways—Continued.

*Right of Pre-emption in Adjoining Owners.*—A railway company having superfluous land adjoining a highway can dedicate such land to the public notwithstanding that a power to sell such land is subject to a right of pre-emption in the adjoining landowners.

COATS v. HEREFORDSHIRE COUNTY COUNCIL,  
[1909] 2 Ch. 579; 78 L. J. Ch. 568; 100  
L. T. 695; 73 J. P. 355; 53 Sol. Jo. 245—  
Eve, J.

**3. Disused Tramway—Acts of Ownership—Permitting Passage of Public.**—When one finds an owner alive to the necessity of evidencing his continued possession by periodical perambulations, active to prevent any encroachment upon his soil and warning trespassers, and at the same time permitting the passage of the public over the surface of the soil of which he is asserting this ownership, there are cogent grounds for attributing to the public use an origin which, as against the owner of the soil, has established public rights.

COATS v. HEREFORDSHIRE COUNTY COUNCIL,  
[1909] 2 Ch. 579; 78 L. J. Ch. 568; 73  
J. P. 355; 53 Sol. Jo. 543—Eve, J.

On appeal, at the hearing, appeal abandoned and order varied by consent in respect of a detail not affecting the above: [1909] 2 Ch. 579, at p. 601; 78 L. J. Ch. 781; 101 L. T. 644—C. A.

See S. C., No. 6, *infra*.

**4. Public Body—Dedication Subject to Statutory Powers—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 308.**—A public body may dedicate works vested in them (*e.g.*, a quay) as a highway, but such dedication is a limited one in the sense that they do not thereby prejudice or affect any statutory powers they may have of altering and improving from time to time the works vested in them.

Where the property of an adjoining owner is injured by any such alteration and the alteration is in the Act authorising the same made a purpose of the Public Health Act, 1875, and the provisions of that Act are made to apply thereto, such adjoining owner is entitled to compensation under sect. 308 of that Act.

ARNOTT v. WHITBY URBAN DISTRICT COUNCIL  
[(No. 2), 101 L. T. 14; 73 J. P. 369; 7  
L. G. R. 856—Eady, J.]

## (c) Prescription.

[No paragraphs in this vol. of the Digest.]

## II. RIGHT OF PASSAGE.

[No paragraphs in this vol. of the Digest.]

## III. ROADSIDE STRIPS AND DITCHES.

See also Nos. 2, 3, *supra*.

### (a) Adjoining Owners.

[No paragraphs in this vol. of the Digest.]

### (b) Presumption of Dedication.

**5. Highway—Ditch—Inclosure Award—Permitting Pipes to be Laid—Dedication—Animus**

dedicandi.]—In pursuance of an Inclosure Act passed in 1788 allotments were made to the predecessors in title of the plaintiff, and the allottees were directed to make and for ever maintain a sufficient fence and ditch on the south side thereof. The inclosure award set out a public highway on the south side of the allotments of the breadth forty feet between and exclusive of the ditches and fences. The plaintiff purchased the allotments in 1889, and upon several occasions he cleaned out the ditch. From time to time houses were built on portions of the allotments alongside the said highway, and the ditch in front thereof was filled in and enclosed. In 1901 the remaining length of the ditch was piped in and filled up by the defendants with the assent of the plaintiff. The road had a seven feet wide pavement alongside the site of the ditch, and, inclusive of the footpaths, was about forty-seven feet wide. Many persons, however, walked over the site of the ditch, and it was used for the purposes of passage without protest for nearly four years, when the plaintiff enclosed the site of the ditch with a temporary paling fence. The council objected to this fence, but it remained until 1907, when it was replaced by a wall, which the defendants pulled down.

**HELD**—that the site of the ditch belonged to the plaintiff, and that there had been no dedication thereof as a highway.

WALMSLEY v. FEATHERSTONE URBAN DISTRICT  
[COUNCIL, 73 J. P. 322; 7 L. G. R. 806—  
Eady, J.]

**6. Tramway on Roadside Strip—Purchase by Railway Company—Abandonment of Tramway—Strip regarded as Superfluous Land—Right of Pre-emption in Adjoining Owner—Combined Dedication—Acts Asserting Ownership of Soil Coupled with Acquiescence in Public Use.**—In 1818 a strip of land lying alongside a highway in a sparsely populated agricultural district was purchased by a tramway company under statutory powers, and was used by them for the purposes of a horse tramway. The tramway company fenced off the strip from the adjoining land from which it was taken, but left it open to the road. The tramway company was dissolved and its lands and undertaking were purchased by a railway company, who were given statutory powers either to use parts of the tramway and certain of the tramway lands, including the strip in question, for the purposes of its own undertaking or not, as they should think fit, and to sell any part thereof not so used with a right of pre-emption to adjoining owners. In 1865 the railway company discontinued the use of the tramway and removed its rails. They did not, however, nor did their successors in title, another railway company, make any use of the strip in question for the purposes of their own undertakings. In 1906 the railway company then in possession sold the strip to the adjoining owner. The highway authority claimed that the strip had been dedicated to public uses.

**HELD**—that since 1865 the strip was capable of dedication and that the railway companies were in a position to dedicate it, and that they were not incapacitated from so doing by the

### III. Roadside Strips and Ditches—*Continued.*

right of pre-emption in the adjoining owner; that the acts of user proved were sufficient to show an intention to dedicate; that the conduct of the railway companies in asserting from time to time their ownership of the soil while they acquiesced in the user of the surface by the public, further established an intention to dedicate on their part, and that the surface of the strip had therefore been dedicated to highway uses.

HELD, FURTHER—that between 1818 and 1865 the land was capable of dedication, and that there was a body capable of dedicating it.

HELD, FURTHER—that assuming it was necessary to prove a combined dedication by the company and the adjoining owner, there was a period of five years during which there was an owner capable of joining with the company to make a dedication.

COATS v. HEREFORDSHIRE COUNTY COUNCIL, [1909] 2 Ch. 579; 78 L. J. Ch. 568; 100 L. T. 695; 73 J. P. 355; 53 Sol. Jo. 245, 543—Eve, J.

On appeal, at the hearing, appeal abandoned and order varied by consent in respect of a detail not affecting the above: [1909] 2 Ch. 579, at p. 601; 78 L. J. Ch. 781; 101 L. T. 644—C. A.

### IV. OWNERSHIP OF SOIL.

7. *Presumption of Lost Grant—Turnpike Road—Land Acquired under Turnpike Trust Act—Vesting in Local Authority—Fee Farm Rent—Payment for Long Period—Liability of Local Authority.*—About 1802 a piece of land was acquired by turnpike trustees from the plaintiffs and used to widen a lane, but no conveyance could now be found. From that date a fee farm rent was paid in respect of the land, first by the turnpike trustees and then by the defendants, in whom it became vested under the Public Health Act, 1848. In 1904 the defendants refused to make any further payment.

HELD—that the defendants were terre-tenants, for they had a statutory determinable fee simple in such portion of the soil as was vested in them by the Public Health Act, and that interest made them liable for the rent, and also that, having regard to the length of time during which the rent had been paid, the Court would presume that the turnpike trustees acquired this land from the plaintiffs as land subject to a fee farm rent without further payment.

FOLEY'S CHARITY TRUSTEES v. DUDLEY CORPORATION, [1909] W. N. 250—C. A.

### V. DIVERSION.

8. *Old Footpath—Diversion Order—New Footpath along side of New Road—Effect of Substitution—Liability of Inhabitants to Repair New Road.*—The respondents objected to the proposals of the appellants to do certain private street works in respect to a road called Gloucester Road, on the ground that the road was repairable by the inhabitants at large. In 1868 a diversion order had been made for the stopping up and

diversion of a public footpath or highway. Both parties agreed to assume that this footpath or highway had existed prior to the passing of the Highway Act, 1835, and was a highway repairable by the inhabitants at large. The diversion order recited that the footpath was to be diverted so as to run along a new road lately made. This new road was the one now known as Gloucester Road, and the question was whether this new road including the footpath had been made in substitution for the old footpath or whether the diversion merely consisted in the substitution for the old footpath of the new footpath along the side of the new road.

HELD—that as the intention of the diversion was to provide accommodation for vehicular as well as pedestrian traffic, the whole width of the new road, including the new footpath, had been substituted for the old footpath, and was therefore repairable by the inhabitants at large.

KINGSTON-ON-THAMES CORPORATION v. [BAVERSTOCK AND OTHERS, 100 L. T. 935; 73 J. P. 378; 7 L. G. R. 831—Div. Ct.]

### VI. MANAGEMENT AND CONTROL OF HIGHWAYS.

[No paragraphs in this vol. of the Digest.]

### VII. REPAIR AND MAINTENANCE OF HIGHWAYS.

See also No. 8, *supra*.

#### (a) Awarded Road.

9. *Inclosure Award—Private Road—Liability to Repair—Carriage or Cart Way—Laid Out and Constructed—Commons Inclosure Act, 1845 (8 & 9 Vict. c. 118), s. 68—Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 23.*—A valuer, appointed by commissioners, whose duty it was to make a scheme for the inclosure of certain lands under the Commons Inclosure Act, 1845, in an award set out that a private carriage or occupation road, called No. 19, was for the use of the persons interested for the time being in the old inclosures adjoining the road, as well as the allotments numbered 79, 80, 81, and 82, and directed that the road should be maintained and repaired by the owner and proprietor of the allotment numbered 79. The valuer marked out the road, levelled it by cutting off the hills, and to a certain extent after levelling put road metal in the damp places and holes. The road having fallen into disrepair, became impassable for carts in wet weather. The plaintiff, as owner and occupier of allotment No. 82, brought an action against the defendant, as owner and occupier of allotment No. 79, for a declaration that the defendant was liable to repair and maintain the said road.

HELD—that what the valuer did was a formation and completion of the road within the meaning of sect. 68 of the Commons Inclosure Act, 1845, and that the Act placed upon the owner for the time being of allotment 79 a liability to put the road from time to time in as good a condition, with regard to levels and surface, as it was left in by the valuer.

*Quære*, whether when there is a public right of way by means of a footpath, dedicated prior to



## VII. Repair and Maintenance of Highways— *Continued.*

the passing of the Highway Act, 1835, and a private road is constructed under the Commons Inclosure Act, 1845, over the same site, the local authority or the persons responsible for the repair of the highways would be immune under sect. 23 of the Highway Act from keeping it up so far as it was proper for the purposes of the passage of foot passengers.

REYNOLDS *v.* BARNES, [1909] 2 Ch. 361; 78 [L. J. Ch. 641; 101 L. T. 71; 73 J. P. 330—Parker, J.]

### (b) Drainage.

[No paragraphs in this vol. of the Digest.]

### (c) Indictment for Non-repair.

[No paragraphs in this vol. of the Digest.]

### (d) Mandamus.

[No paragraphs in this vol. of the Digest.]

### (e) Material for Repair.

[No paragraphs in this vol. of the Digest.]

### (f) Miscellaneous.

[No paragraphs in this vol. of the Digest.]

### (g) Misfeasance.

[No paragraphs in this vol. of the Digest.]

### (h) Mode of Repair.

10. *Evidence of Negligence—Whole Road Done at Once—Five Inches of Granite over Road—Road not Scarified—No Warning Notice—Action for Damage to Horse that has pulled heavy Waggon over Granite.*—In an action for damages for negligence for injury alleged to have been caused to a horse that died after pulling a loaded waggon over a stretch of country road which was being laid with granite by the defendants, the particulars of negligence alleged were (1) that the road was not closed; (2) that no warning notice was erected; (3) that the road had not been scarified; (4) that the road was not laid in halves; (5) that the road was laid with granite to so great a depth as five inches. There was evidence to support these allegations. It appeared also that the stretch of country road was about 130 feet in length, part of it rolled, part of it rolled but not rolled in, and the rest of it unrolled or only rolled once. The waggoner put his horses to the task without asking for help from the men with the steam-roller that was there or otherwise. The waggon could not turn round in the lane. The jury found (1) that there was negligence on the part of the defendants' servants; (2) that the plaintiff and his driver could not, by the exercise of reasonable care, have avoided the consequences of the defendants' negligence; and (3) that the death of the plaintiff's horse was the natural and necessary consequence of the defendants' negligence; and judgment was entered for the plaintiff.

HELD—per Alverstone, L. C. J., on the facts of the case, that the plaintiffs should have been non-suited, as, although there was evidence that the defendants had been negligent by way of misfeasance, there was no evidence that the death

of the plaintiff's horse was the natural and necessary consequence of the defendants' acts.

HELD—per Sutton, J., there was evidence to go to the jury on all the three questions left to them.

Accordingly, the Court being divided in opinion, the appeal was dismissed.

99 L. T. 817; 72 J. P. 526; 7 L. G. R. 60—[Div. Ct.]

HELD by C. A.—that the judgment of Alverstone, L. C. J., was right, that the plaintiff's servant had elected to run the risk of taking the horse with the heavy load across the loose metal, and that there was no evidence that the death of the horse was the natural and necessary consequence of the defendants' negligence.

TORRANCE *v.* ILFORD URBAN DISTRICT [COUNCIL, 73 J. P. 225; 25 T. L. R. 355; 53 Sol. Jo. 301; 7 L. G. R. 554—C. A.]

### (i) Ratione Tenuræ.

[No paragraphs in this vol. of the Digest.]

## VIII. EXTRAORDINARY TRAFFIC.

### (a) Contributory Negligence of Authority.

[No paragraphs in this vol. of the Digest.]

### (b) Liability for Damage.

11. *Timber Haulage—Staple Trade of District—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12.*—There is nothing in the case of *Ruglan Highway Board v. Monmouth Steam Co.* (1881), 46 J. P. 598, to the effect that if the traffic in question is common to the district, or is the staple trade of the district, it must, as regards any particular road in the district, be held to be ordinary and not extraordinary traffic. The question of whether traffic is extraordinary or not is one of fact; and in such a case as the above the Court must consider at what intervals such traffic is in fact conducted over the particular road, and whether such intervals are sufficiently short and regular to make the traffic ordinary on the particular road.

Decision of Divisional Court (72 J. P. 321; 6 L. G. R. 733) affirmed.

GEIRIONYDD RURAL DISTRICT COUNCIL *v.* [GREEN, [1909] 2 K. B. 845; 78 L. J. K. B. 1039; 100 L. T. 418; 73 J. P. 137; 25 T. L. R. 282; 7 L. G. R. 308—C. A.]

12. *"By whose Order Traffic has been Conducted"—Syndicates Subsidiary to Company—Highways and Locomotives (Amendments) Act, 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12.*—The defendants, who had acquired from certain landowners the right to prospect for coal, entered into agreements with two incorporated syndicates which were subsidiary to the defendant company that these syndicates should undertake the boring for the coal at certain spots defined by the defendants. In connection with the work undertaken



VIII. **Extraordinary Traffic**—*Continued.*

by the two syndicates damage to certain highways was occasioned by the extraordinary traffic passing over the same.

HELD—that the syndicates were contractors; that the defendants were the persons by whose order or authority the traffic was conducted; and that consequently the defendants were liable for the expenses incurred by the plaintiffs in repairing the damage done by that traffic.

Decision of Jelf, J. (72 J. P. 507) affirmed.

KENT COUNTY COUNCIL *v.* KENT COAL CONCESSIONS, LD., 73 J. P. 305; 25 T. L. R. 479; 7 L. G. R. 899—C. A.

(c) **Limitation of Action.**

13. "*Particular Building Contract*"—*Several Parts of Connected Contract*—*Locomotives Act*, 1898 (61 & 62 Vict. c. 29), s. 12, sub-s. 1 (b).]—The defendants contracted with a firm for the construction of a collecting and a service reservoir and for the laying of pipes between them and from the service reservoir to C. By reason of the haulage of these pipes extraordinary expenses were incurred by the plaintiffs in repairing certain roads in their district, and the plaintiffs sued the defendants to recover the amount of those expenses. At the date of the issue of the writ in that action the laying of the pipes which caused most of the damage and expenses claimed had been completed more than six months.

HELD—that the contract entered into between the defendants and their contractors was a "particular building contract" for one connected building operation, consisting of several parts, and that the plaintiffs were entitled, under sect. 12, sub-sect. 1 (b), of the Locomotives Act, 1898, to bring their action for the recovery of the expenses incurred by them in the repair of the roads, at any time within six months of the completion of the whole contract.

Decision of Channell, J., reversed.

CARLISLE RURAL DISTRICT COUNCIL *v.* MAYOR, [ETC., OF CARLISLE (W. KENNEDY, THIRD PARTY), [1909] 1 K. B. 471; 78 L. J. K. B. 307; 100 L. T. 216; 73 J. P. 121; 25 T. L. R. 237; 53 Sol. Jo. 228; 7 L. G. R. 268—C. A.

14. *Work Extending over a Long Period*—"*Completion of the Contract or Work*"—*Locomotives Act*, 1898 (61 & 62 Vict. c. 29), s. 12, sub-s. 1 (b).]—The defendants entered into a contract with a contractor for the construction by him of a watertight reservoir, and its maintenance for six months after completion. The reservoir was ready for filling on February 22nd, 1906, and was filled shortly afterwards; but, on cracks appearing, the reservoir was emptied and the cracks repaired. The reservoir was rendered watertight by the middle of May, 1906. By reason of the haulage of material by the contractor in connection with the work, extraordinary expenses were incurred by the plaintiffs in repairing certain roads in their district, and they commenced an action in the county court on November 1st, 1906, to recover the amount of

those expenses. The county court judge held that the six months limited by sect. 12, sub-sect. 1 (b), of the Locomotives Act, 1898, was to be calculated from the time of the substantial completion of the contract or work the carrying out of which had caused the damage to the roads, and he found that the actual work that had to be done—viz., the construction of the reservoir—was not completed till the middle of May, 1906. On appeal, the Divisional Court held that the reservoir was completed in the ordinary sense when the water was let in—viz., on February 6th, 1906.

HELD—that there was no evidence that the county court judge had misdirected himself in coming to the conclusion that the work of construction was not complete until the reservoir was made watertight, and that his judgment must be restored.

Decision of Divisional Court (72 J. P. 301; 99 L. T. 168; 6 L. G. R. 936) reversed.

REIGATE RURAL DISTRICT COUNCIL *v.* SUTTON [DISTRICT WATER CO. (EWART, THIRD PARTY), [1909] W. N. 28; 78 L. J. K. B. 315; 100 L. T. 354; 73 J. P. 161; 25 T. L. R. 266; 53 Sol. Jo. 243; 7 L. G. R. 280—C. A.

(d) **Practice.**

[No paragraphs in this vol. of the Digest.]

IX. **OBSTRUCTION OF HIGHWAYS.**

See also MAGISTRATES, No. 6; METROPOLIS, Nos. 12, 13.

15. *Animal Straying on Highway*—*Negligence*.]—The defendant's sow, which had strayed on to a highway, jumped up from the side of the hedge as a horse and van were about to pass a motor-car. The horse was frightened by the sow and shied in front of the car, which then collided with the horse and van and a stone wall and was damaged. In an action by the owner of the motor-car against the defendant in respect of the damage done to the motor-car, the jury found that the defendant was not guilty of negligence in allowing the sow to be on the road; that the sow caused the horse to shy; that the probable result of the sow being on the road as described was to cause the horse to shy; but the jury could not agree as to whether the driver of the motor-car was guilty of contributory negligence.

HELD—that on these findings judgment must be entered for the defendant.

Judgment of Bray, J., in *Hadwell v. Righton* ([1907] 2 K. B. 345; 76 L. J. K. B. 891; 71 J. P. 499; 97 L. T. 133; 23 T. L. R. 548; 5 L. G. R. 881) approved.

HIGGINS *v.* SEARLE, 100 L. T. 280; 73 J. P. [185; 25 T. L. R. 301; 7 L. G. R. 640—C. A.

X. **BRIDGES.**(a) **Erection and Repair.**

16. *Bridge Carrying Road over Railway*—*Approaches*—*Fences on Side of Approaches*—*Repair*—*North Midland Railway Act* (6 & 7

**X. Bridges—Continued.**

Will. 4, c. cvii.), s. 73.]—Under statutory authority, the predecessors in title of the defendant company carried a turnpike road, now a main road, over their line of railway by means of a bridge and approaches thereto. By the Act under which this was done it was provided that the road over the bridge should be formed and should at all times be continued of such width as to leave a clear and open space between the fences of not less than 25 feet, that the ascent of the bridge should not be more than 1 foot in 30 feet, and that a good and sufficient fence should be made on each side of the bridge, which fence should not be less than 4 feet above the surface of the bridge.

**HELD**—that the word “bridge” as used in the section included the approaches of the bridge on either side thereof, and the expression “road over such bridge” included the road over the approaches; that the word “continued” implied an obligation to do from time to time all things necessary in order that the bridge should be such a bridge as required by the Act; and that according to the true construction of the section the defendants were liable for the maintenance of the bridge, including its approaches and fences.

Decision of Parker, J. (99 L. T. 961; 73 J. P. 92; 25 T. L. R. 189; 7 L. G. R. 219) affirmed.

**ATTORNEY-GENERAL v. MIDLAND RY. CO.**, 100 [L. T. 866; 73 J. P. 337; 25 T. L. R. 547; 53 Sol. Jo. 520; 7 L. G. R. 998—C. A.

**17. Bridge Carrying Road over Railway—Not a “Public Highway”—Maintenance of Road and Bridge—Construction of Special Act—Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), s. 39.**—By their special Act a railway company were empowered to carry a road over their line; the Act did not specify that they were to “maintain” the bridge, and as the road was not a “public highway” the maintenance sections of the general statute of 1845 did not apply.

**HELD**—that (except for their own purposes and safety) the railway company need not maintain either the bridge or the roadway over it.

Decision of the First Division of the Court of Session ([1908] S. C. 244) affirmed.

**CALEDONIAN RY. CO. v. GLASGOW CORPORATION**, [1909] A. C. 138; 78 L. J. P. C. 52; 99 L. T. 784; [1909] S. C. (H. L.) 5; 46 Sc. L. R. 30—H. L.

**18. Bridge over Railway—Width of Bridge and Approaches—Duty to Widen—Special Act—Incorporation of Prior Special Act—Provision Inconsistent with General Act—Taff Vale Railway Acts, 1836 (6 & 7 Will. 4, c. lxxvii.), s. 69, and 1846 (9 & 10 Vict. c. cccxciii.), ss. 1, 3—Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), ss. 50, 51.**—By sect. 69 of the Taff Vale Railway Act, 1836, where a bridge was erected to carry a public highway over the railway the road over the bridge was to be of a width between the fences of not less than 15 ft. By sect. 1 of the Taff Vale Railway Act, 1846, “all

the provisions contained in” the Act of 1836 “relating to the Taff Vale Railway . . . except such of them as are inconsistent with the provisions of . . . the Railways Clauses Consolidation Act, 1845, and except also such as by this Act are altered or otherwise provided, shall extend to this Act and to the several purposes thereof as fully and effectually as though such provisions were re-enacted in this Act as applicable to such purposes.” By sect. 3, “all the provisions of the . . . Railways Clauses Consolidation Act, 1845, so far as the same are applicable, and save in so far as the same may be inconsistent with the provisions hereinafter mentioned, shall extend to this Act and to the several purposes thereof, and the same together with this Act shall be read together as one Act.” By sect. 1 of the Railways Clauses Act, 1845, the Act “shall apply to every railway which shall, by an Act which shall hereafter be passed, be authorised to be constructed, and this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorised thereby, so far as the same shall be applicable to such undertaking, and shall . . . form part of such Act and be construed together therewith as forming one Act.” Sects. 50 and 51 of the Act provided that every bridge carrying a public carriage road over a railway should (except as otherwise provided by the special Act) have a specified width, which was greater than the width prescribed in the Taff Vale Railway Act, 1836.

**HELD**—(1) that the question of the width of a bridge carrying a public carriage way over the railway was governed by the Railways Clauses Act, 1845, and therefore that the railway company were bound to widen the bridge in accordance with the provisions of that Act; but (2) that the railway company were not bound to widen the approaches to the bridge, as the word “bridge” in sect. 51 of the Railways Clauses Act, 1845, does not include the approaches.

Decision of C. A. ([1908] 1 K. B. 239; 77 L. J. K. B. 424; 98 L. T. 356; 72 J. P. 25; 24 T. L. R. 165; 6 L. G. R. 201) varied.

**RHONDDA URBAN DISTRICT COUNCIL v. TAFF VALE RY. CO.**, [1909] A. C. 253; 78 L. J. K. B. 647; 100 L. T. 713; 73 J. P. 257; 25 T. L. R. 483; 7 L. G. R. 616—H. L.

**19. Reconstruction—Obligation to Raise Bridge over Canal so as not to Constitute a Nuisance.**

**HELD**—that the defendants being bound to repair and reconstruct a bridge passing over a canal were liable in doing so to raise it so as to prevent it from being a nuisance and an obstruction to navigation.

**NORTH STAFFORDSHIRE RY. CO. v. MAYOR, ETC.**, [OF HANLEY, 73 J. P. 477; 26 T. L. R. 20—C. A.

**(b) Tolls.**

**20. Statutory Tolls—Lease—Rates not to be Increased—Conway Bridge Act, 1878 (41 Vict. c. lxviii.), s. 16, Sched.]**—In 1907 the Commissioners constituted by the Conway Bridge Act,

**X. Bridges—Continued.**

1878, demised to the defendant at an annual rent the tolls which were or could be demanded or taken on the bridge, subject to all statutory restrictions and exemptions, and so that the tolls should not be increased beyond those then levied and taken. By the Schedule to the Act a toll of sixpence is payable for every horse drawing a carriage, but at the date of the lease one toll only was taken for a hackney carriage passing over the bridge with passengers and returning with the same passengers or without passengers on the same day, and no toll was demanded for a hackney carriage passing without passengers. At the date of the lease and for many years previously there was a notice board at the bridge on which was a copy of the schedule to the Act. The defendant having intimated that he would, after March 1st, 1909, charge a toll in the case of a carriage plying for hire every time it crossed the bridge, the Commissioners sought to restrain him from doing so, alleging that this would be in breach of the terms of the lease.

**HELD**—that the charge proposed to be made by the defendant was not an increase of toll, but was an imposition originally authorised from which exemption had hitherto been enjoyed; that the true construction of the lease was that the rates of the tolls should be maintained; and that there had been no breach by the defendant of the terms of the lease.

**CONWAY BRIDGE COMMISSIONERS v. JONES**, 26 [T. L. R. 81—Eve, J.

**XI. STATUTORY INTERFERENCE WITH HIGHWAYS.****(a) Railway Companies.**

**21. Level Crossing—Approaches—Liability of Railway Company to Repair Approaches—Northern and Eastern Railway Company Act, 1836** (6 & 7 Will. 4, c. ciii.), s. 31.]—By their private Act a railway company, the defendant railway company's predecessors, were authorised "to make or construct upon, across, under, or over the said railway . . . such inclined planes . . . bridges, roads, ways . . . as the company shall think proper . . . and also to divert or alter the course of any roads or ways or to raise or sink any roads or ways, in order the more conveniently to carry the same over or under or by the side of the said railway . . . and also from time to time to alter, repair, or discontinue the before-mentioned works or any of them, and to substitute others in their stead . . . doing as little damage as may be . . . and the said company making full satisfaction . . . for all damage. . ."

The railway company in making their railway constructed it so as to cross certain highways by means of level crossings, and as the railway at those crossings was at a higher level than that of the original highways, the company, in order to bring the highways up to the level of the railway and to render the highways continuous and without interruption from a difference in level between the railway and the original levels of the adjoining lengths of highways and so as to

restore their use, raised such adjoining lengths of highways on either side of the railway; and they erected gates by the side of the railway at each side of the level crossings.

**HELD**—that the railway company were bound to repair and keep in repair the portions of the highways adjoining the level crossings which had been so raised.

**Decision of Jelf, J.** ([1909] 1 K. B. 368; 78 L. J. K. B. 249; 99 L. T. 843; 73 J. P. 84; 25 T. L. R. 198; 7 L. G. R. 208) affirmed.

**HERTFORDSHIRE COUNTY COUNCIL v. GREAT [EASTERN RY. CO.]**, [1909] 2 K. B. 403; 78 L. J. K. B. 1076; 101 L. T. 213; 73 J. P. 353; 25 T. L. R. 573; 53 Sol. Jo. 575; 7 L. G. R. 1006—(C. A.

**(b) Tramways.**

[No paragraphs in this vol. of the Digest.]

**(c) Water and Canal Companies.**

[No paragraphs in this vol. of the Digest.]

**XII. PRIVATE STREET WORKS.****(a) Charge on Premises.**

[No paragraphs in this vol. of the Digest.]

**(b) Exemptions from Liability as Owner.**

[No paragraphs in this vol. of the Digest.]

**(c) Local Act.**

[No paragraphs in this vol. of the Digest.]

**(d) Miscellaneous.**

**22. Apportionment of Expenses—Power of Justices as to "Degree of Benefit"—Private Street Works Act, 1892** (55 & 56 Vict. c. 57), ss. 7, 8 (1), 10.]—In the absence of a resolution by the urban authority under sect. 10 of the Private Street Works Act, 1892, that the apportionment of the expenses of making up a street is to be made otherwise than according to frontage, the justices have no jurisdiction under sect. 8 (1) of the Act on the hearing of objections to the provisional apportionment to reduce the apportionment in respect of the degree of benefit to be derived by any premises, or of the amount and value of any work already done by the owners or occupiers.

**BRIDGWATER CORPORATION v. STONE**, 99 [L. T. 806; 72 J. P. 487; 6 L. G. R. 1171—Div. Ct.

**23. Provisional Apportionment—Estimate—Item for Contingencies—Private Street Works Act, 1892** (55 & 56 Vict. c. 57), ss. 6, 7.]—It is permissible for an estimate in a provisional apportionment under the Private Street Works Act, 1892, to contain an item for contingencies. **STANDRING v. BEXHILL CORPORATION**, 73 J. P. [241; 7 L. G. R. 670—Div. Ct.

**(e) New Streets.**

**24. "New Street"—Bye-laws as to "Laying Out New Street"—Infringement—Erection of Cottages Standing Back from Highway—Approaches—Footpath—Public Health Act, 1875** (38 & 39 Vict. c. 55), ss. 4, 157.]—A builder employed by the



**XII. Private Street Works—Continued.**

defendant deposited plans with the local authority showing that he intended to erect cottages some way back from the road with approaches consisting of a footpath 5 or 6 feet wide. The surveyor pointed out to the builder that he could not carry out the intention regarding roads without committing a breach of the bye-laws. The builder, without consulting the defendant, said that a roadway of the required width would be made at the termination of a tenancy over other land the property of the defendant, and sent in an amended plan showing such road. The surveyor, with the consent of the chairman of the roads committee, gave provisional consent to the plans and allowed the work to be commenced. Subsequently, after the building had been commenced, the matter came before the roads committee, who approved the plans subject to a condition that the road should be made up, and the builder wrote saying that the road would be made in due course, but for the present paths would be made. In the result a pathway was formed 202 feet long, the surface being levelled and covered with mortar and rubble, with sand on the top. In an action against the defendant and the builder for (1) a declaration that the defendants had laid out a new street in contravention of a bye-law by reason of the same not being 36 feet wide and not having been constructed for use as a carriage road, (2) a mandatory injunction or order requiring the defendants to widen the said new street.

**HELD**—that the words "new street" in sect. 157 of the Public Health Act, 1875, were not confined to new streets in the broad and popular sense of roadways with houses on either side, but may include lanes, alleys and passages, that the local authority had power to make bye-laws respecting new roads which were not intended to have houses on either side, that the defendant had by his agent laid out and constructed a new street in contravention of the bye-laws, and that an injunction must be granted.

**ATTORNEY-GENERAL v. GIBB**, [1909] 2 Ch. 265; [78 L. J. Ch. 521; 101 L. T. 16; 73 J. P. 343; 7 L. G. R. 754—Parker, J.]

**(f) Notices.**

**25. Notice to Frontager—No Reference in Notice in Deposited Plans—Public Health Act, 1875** (38 & 39 Vict. c. 55), ss. 150, 257, 317, and *Sched. IV., Form G.*—A notice served by a local authority under sect. 150 of the Public Health Act, 1875, requiring the owner of property adjoining a private street to sewer, level, pave, etc., such street must, to be valid, contain a specific reference to the deposited plans and sections of the structural works intended to be executed and state that they are open to inspection.

**STOURBRIDGE URBAN DISTRICT COUNCIL v. BUTLER AND GROVE**, [1909] 1 Ch. 87; 78 L. J. Ch. 59; 99 L. T. 912; 73 J. P. 3; 25 T. L. R. 24; 7 L. G. R. 183—Neville, J.]

**26. Posting on Land—"Conspicuous" Place—Post upon Boundary—Public Health Act, 1875.**

(38 & 39 Vict. c. 55), s. 267.]—It is a question of fact whether a notice is posted on a "conspicuous part" of a piece of vacant land so as to satisfy s. 267 of the Public Health Act, 1875.

**SO HELD**—where a notice had been fixed to a post just on the boundary between the defendant's land and another plot, and the county court judge held that even if half the post was, strictly speaking, on his land the notice was not on a "conspicuous part" of it.

**WEST HAM CORPORATION v. THOMAS**, 73 J. P. [65; 6 L. G. R. 1043—Div. Ct.]

**(g) Objections.**

*See also EVIDENCE, No. 7.*

**27. Notice of Objection to Provisional Apportionment—Mistake—Point not Raised by Notice of Objection—Power to Amend Provisional Apportionment—Private Street Works Act, 1892** (55 & 56 Vict. c. 57), ss. 7, 8 (1).—The appellant was the owner of certain land abutting on a street in the district of the respondents, who resolved under the Private Street Works Act, 1892, to make up the street. The appellant appeared in the provisional apportionment as liable to be charged in respect of certain land abutting on the south side of the street, and a colliery company appeared therein as owners or reputed owners of certain agricultural land abutting on the north side of the street. The appellant gave written notice of objection on the ground that the provisional apportionment was incorrect in respect of the degree of benefit to be derived by the owners and occupiers on the north side. The justices ordered that the provisional apportionment should be amended and that the expenses should be apportioned according to frontage, and that notice should be given to the owners or reputed owners shown as liable to be charged, and they adjourned the hearing. At the adjourned hearing the justices found that the colliery company were only lessees and they ordered the name of the Duke of Portland to be substituted as the owner of the agricultural land, that notice should be given to the duke and that the hearing should be further adjourned. On the further adjournment the Court found that the duke's land did not abut upon the street, and they ordered his name to be omitted and the provisional apportionment to be amended, and they adjourned the hearing again. In the provisional apportionment thus amended the appellant appeared as owner or reputed owner of a strip of land lying between the duke's land and the street. On the final hearing it was proved that the appellant was the owner of this strip of land, and the justices confirmed the provisional apportionment as thus amended.

**HELD**—that although there had been no notice of objection to the provisional apportionment on the ground of the omission of the name of the appellant as the person chargeable in respect of the strip of land, the justices had power to amend the provisional apportionment in this respect and to confirm it as so amended.

**HALL v. BOLSOVER URBAN DISTRICT COUNCIL**, [100 L. T. 372; 73 J. P. 140; 7 L. G. R. 403—Div. Ct.]

**XII. Private Street Works—Continued.**

28. *Provisional Apportionment—Road only partly in Contributory Place—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 295—Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 4.*—The Local Government Board issued an Order putting in force certain provisions of the Private Street Works Act, 1892, in the contributory place of Saughall-Massey, as regards a road which was described in the Order as being in that contributory place. Half of the road was in fact in the contributory place of Grange, which was not included in the Order. On objection being taken to a provisional apportionment relating to the whole of the road, on the ground that the local authority had no power under the Order to make up the whole of the road at the expense of the frontagers, it was

HELD—that there was no power in the justices to make any order on the basis that the whole road could be dealt with under the powers of the Order of the Local Government Board.

R. v. CHESHIRE JUSTICES, EX PARTE VYNER.  
[101 L. T. 683; 73 J. P. 499; 7 L. G. R. 1138  
—Div. Ct.]

**(h) Owners.**

[No paragraphs in this vol. of the Digest.]

**(i) Property in Street.**

[No paragraphs in this vol. of the Digest.]

**(k) "Street."**

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**XIII. MISCELLANEOUS.**

[No paragraphs in this vol. of the Digest.]

**HIRE OF GOODS.**

*See* BAILMENT.

**HIRE-PURCHASE.**

*See* BAILMENT; BANKRUPTCY; BILLS OF SALE.

**HOLIDAYS.**

*See* TIME.

**HOMICIDE.**

*See* CRIMINAL LAW.

**HONG KONG.**

*See* DEPENDENCIES AND COLONIES.

**HORSE RACING.**

*See* GAMING AND WAGERING.

**HORSE SLAUGHTERERS.**

*See* ANIMALS.

**HOSPITALS.**

*See* CHARITIES; MASTER AND SERVANT, No. 101; PUBLIC HEALTH.

**HOTELS.**

*See* INNS AND INNKEEPERS.

**HOUSE AGENT.**

*See* AGENCY; REVENUE; SALE OF LAND; VALUERS AND APPRAISERS.

**HOUSEBREAKING IMPLEMENTS, POSSESSION OF.**

*See* CRIMINAL LAW AND PROCEDURE.

**HOUSE OF LORDS.**

*See* COURTS; PARLIAMENT.

**HOUSING OF THE WORKING CLASSES.**

*See* COMPULSORY PURCHASE; METROPOLIS; PUBLIC HEALTH.

**HUSBAND AND WIFE.****I. PROMISE TO MARRY . . . . . COL.**

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See also BANKRUPTCY, Nos. 24, 26; CONTRACT, No. 6; DEPENDENCIES, No. 27; EQUITY, No. 1; INSURANCE, No. 6; POWERS, No. 2; PRACTICE; SALE OF GOODS, No. 7.

**I. PROMISE TO MARRY.**

[No paragraphs in this vol. of the Digest.]

**II. MARRIAGE.****(1) Presumption.**

[No paragraphs in this vol. of the Digest.]

**(2) Proof.**

**1. Practice—Petition for Restitution of Conjugal Rights—Proof of Marriage in India by Certificate.**—The solemnisation of a marriage between Christians in British India may be proved by the production of a certificate of the marriage from the India Office.

BRAID *v.* BRAID, 25 T. L. R. 646—Bigham, [Pres.]

**(3) Validity.**

**2. Marriage by Repute in Foreign Country—No Formal Ceremony.**—A foreign marriage which is recognised as valid by the law of the domicile of the parties will be held good by the law of England, notwithstanding that there has been no formal ceremony of marriage. Thus, a marriage by repute which is valid by the law of the domicile will be recognised as valid by the English Courts.

IN RE GREEN, NOYES *v.* PIPKIN, 25 T. L. R. 222—Bady, J.

**3. Marriage in England between Englishwoman and Hindu Domiciled in India—Personal Incapacity by Hindu Law.**—A foreigner domiciled abroad who comes to this country and



## II. Marriage—Continued.

marries here in due form according to English law a domiciled Englishwoman, cannot afterwards be heard to say that by the law of his domicile a disability of a personal character prevented him from legally entering into such marriage.

A British subject from British India, a Hindu, went through the ceremony of marriage in England with a domiciled Englishwoman intending it to be a binding ceremony of marriage. Subsequently, to a petition by the wife for a judicial separation on account of his desertion, the husband alleged that according to Hindu law and religion—the law of his domicile and his personal law—he could not marry outside his own caste or with one who was not a Hindu by religion.

**HELD**—that the husband could not be allowed to set up against the marriage, which was contracted here according to English law, a personal disqualification imposed by the law of his domicile.

**VENUGOPAL CHETTI v. VENUGOPAL CHETTI**, [1909] P. 67; 78 L. J. P. 23; 99 L. T. 885; 25 T. L. R. 146; 53 Sol. Jo. 163—Barnes, Pres.

**4. Marriage in Schoolroom—Bishop's Licence—Church Marriage Act, 1824** (5 Geo. 4, c. 32), s. 1.]—The parties to a divorce suit were married in a schoolroom adjoining a church as the church was at the time undergoing repairs. Evidence was given that the bishop of the diocese had duly licensed the schoolroom for the celebration of divine service and the solemnisation of marriages during the period that the church was undergoing repairs, and the licence of the bishop having been produced:—

**HELD**—that the marriage had been validly celebrated.

**WILLIAMS v. WILLIAMS**, 25 T. L. R. 232—[Deane, J.]

### (4) Miscellaneous.

**5. Issue of Licence to Young Persons—Duty of Registrar.**]—Observations as to the duty of registrars of marriages when issuing marriage licences to young persons who state that they are of full age, but with regard to whom the circumstances suggest inquiry.

**NORSWORTHY, BY HIS GUARDIAN v. NORSWORTHY**, 26 T. L. R. 9—Deane, J.

## III. PERSONAL RIGHTS AND OBLIGATIONS ARISING FROM MARRIAGE.

[No paragraphs in this vol. of the Digest.]

## IV. EFFECT OF MARRIAGE WITH REGARD TO PROPERTY.

See also **EQUITY**, No. 1; **POWERS**, Nos. 2, 6.

### (1) Conveyance by Wife.

**6. Undue Influence—Mortgage by Wife to Secure Husband's Debts—Presumption.**]—The relation of husband and wife does not raise a

presumption of undue influence. A mortgage by a wife to secure her husband's debts is not void merely because she had no independent advice.

**BANK OF AFRICA, LD. v. COHEN**, [1909] W. N. [50; 100 L. T. 295; 25 T. L. R. 285; 53 Sol. Jo. 268—Eve, J.]

See **S. C.** under **CONFLICT OF LAWS** (a), No. 2.

### (2) Dower, etc.

**7. Divorce—Restoration of Dower—Procedure—Married Women's Property Act, 1882** (45 & 46 Vict. c. 75), s. 17—*Matrimonial Causes Act, 1859* (22 & 23 Vict. c. 61).]—A registrar has no power to make an order under sect. 17 of the Married Women's Property Act, 1882, but a report made by him upon an application under this section may be confirmed by an order made by a judge of the High Court.

**JOSEPH (OTHERWISE KING) v. JOSEPH**, [1909] [P. 217; 78 L. J. P. 51; 100 L. T. 864; 25 T. L. R. 439; 53 Sol. Jo. 400—Bigham, Pres.]

### (3) Separate Estate.

See also **BANKRUPTCY**, No. 24; **WILLS**, No. 27; **PARTITION**, Nos. 1, 2.

**8. Exercise of General Power of Appointment—Separate Estate—"Debts or Other Liabilities"**—*Married Women's Property Act, 1882* (45 & 46 Vict. c. 75), s. 1 (3), (4); s. 4.]—Property appointed by a married woman by her will, before 1893, under a general power of appointment is not thereby made liable on her death for her "debts and other liabilities" if at the time when she contracted them she had no separate estate.

*In re Ann, Wilson v. Ann* ([1894] 1 Ch. 549; 63 L. J. Ch. 334; 70 L. T. 273—Kekewich, J.) overruled.

**IN RE FIELDWICK, JOHNSON v. ADAMSON**, [1909] 1 Ch. 1; 78 L. J. Ch. 153; 100 L. T. 106; 53 Sol. Jo. 47—C. A.]

**9. Judgment against Husband and Separate Estate of Wife—Joint General Power of Appointment—Writ of Elegit—Execution.**]—The plaintiff, J.'s trustee in bankruptcy, obtained a judgment for costs against J. and his wife, but, as to the wife, they were ordered to be paid out of her separate estate, and execution was limited to her separate property not subject to restraint on anticipation. At that date certain real property was settled upon trusts subject to a joint general power of appointment by deed by J. and his wife. J. died, and the plaintiff subsequently obtained a writ of elegit in respect of all real property which at the date of the judgment J. and his wife or persons in trust for them possessed or over which they then had any power of disposition exercisable for their own benefit without the assent of any other person, execution being limited as to the wife to her separate estate.

**HELD** that the judgment was not against the husband and wife jointly, but against the husband and the wife's separate estate; that as a general power of appointment exercisable by a woman over property did not make it separate

#### IV. Effect of Marriage with regard to Property —Continued.

estate (*Ex parte Gilchrist* (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538; 34 W. R. 709; 3 Morr. 193), the joint power of appointment did not; that, if the judgment were treated as several, neither wife nor husband alone could dispose of the property within the words of the writ, and that therefore the writ must extend only to the wife's life interest.

GOATLEY v. JONES, [1909] 1 Ch. 557; 78 L. J. [Ch. 420; 100 L. T. 512—Neville, J.]

**10. Dresses Purchased by Wife—Money Supplied by Husband—Paraphernalia.**—Wearing apparel purchased by a married woman for her own personal use with money supplied by her husband is *prima facie* her property, and, in the absence of evidence to rebut this presumption, cannot be claimed by the husband.

There can be no question of paraphernalia during a husband's life.

Observations in *Tasker v. Tasker*, [1895] P. 1; 64 L. J. P. 36; 71 L. T. 779; 11 T. L. R. 51—Jeune, Pres.) commented on.

MASSON-TEMPLIER & Co. v. DE FRIES, [1909] 2 K. B. 831; 101 L. T. 476; 25 T. L. R. 784; 53 Sol. Jo. 744—C. A.

#### V. ANTE-NUPTIAL OBLIGATIONS OF WIFE.

[No paragraphs in this vol. of the Digest.]

#### VI. CONTRACTS OF WIFE.

##### (1) As Agent for Husband.

[No paragraphs in this vol. of the Digest.]

##### (2) With Husband.

[No paragraphs in this vol. of the Digest.]

#### VII. TORTS OF WIFE DURING COVERTURE.

**11. Liability of Husband—Judicial Separation—Decree Obtained before Judgment in Action for Tort—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 26—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (2).**—The liability of a husband for a tort committed by his wife during coverture is by virtue of sect. 26 of the Matrimonial Causes Act, 1857, put an end to by a decree for judicial separation obtained after the commencement of, but before judgment in, an action in respect of the wife's tort.

Decision of Ridley, J. (25 T. L. R. 2; 53 Sol. Jo. 14) reversed.

CENOD v. LESLIE, 1909 1 K. B. 880; 78 [L. J. K. B. 695; 100 L. T. 675; 25 T. L. R. 371; 53 Sol. Jo. 340—C. A.]

#### VIII. GIFTS BETWEEN HUSBAND AND WIFE.

**12. Covenant in Marriage Settlement to Settle After-acquired Property.**—There is no general rule of construction to the effect that covenants in marriage settlements to settle after-acquired

property do not cover gifts by the husband to the wife.

IN RE ELLIS'S SETTLEMENT, *ELLIS v. ELLIS*, [1909] 1 Ch. 618; 78 L. J. Ch. 375; 100 L. T. 511—Eady, J.]

**13. Purchase in Joint Names—Resulting Trust—Presumption of Advancement—Effect of Decree of Nullity—Joint Tenancy.**—A husband purchased a house in the joint names of himself and his wife, he telling her that he was buying it as an investment, and for their joint habitation, and so that she might succeed to it if she survived him and he might have it if he outlived her. Subsequently the wife obtained a decree of nullity of marriage, the decree declaring the marriage to "have been and to be" absolutely null and void, and the wife to "have been and to be" free from the bond of marriage. In an action for a declaration that the wife was entitled as joint tenant to the house:—

**HELD**—that the marriage being voidable and not void, the decree of nullity had no effect on the presumption of advancement, that there was no resulting trust in favour of the husband, and that the plaintiff was entitled to the declaration asked for.

DUNBAR v. DUNBAR, [1909] 2 Ch. 639; 101 [L. T. 553; 26 T. L. R. 21; 54 Sol. Jo. 32—Warrington, J.]

**14. Conveyance taken in Name of Wife—Resulting Trust—Presumption of Advancement—Marriage Declared Null and Void.**—Where a husband takes a conveyance in the name of his wife, the presumption of advancement does not depend on the marriage continuing until the death of either of the parties. Accordingly, the presumption obtains though the marriage has been declared null and void.

*Dunbar v. Dunbar* (*supra*) followed.

McNAUGHT v. McNAUGHT, 54 Sol. Jo. 135—Eve, J.]

#### IX. PROCEEDINGS.

##### (1) Against Husband and Wife.

[No paragraphs in this vol. of the Digest.]

##### (2) Between Husband and Wife.

**15. Action for Protection and Security of Separate Property—Wife in Service—Action against Husband for Malicious Prosecution—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 12.**—An action for false imprisonment and malicious prosecution brought by a wife, who was, at the time of the prosecution, in domestic service, against her husband is not an action "for the protection and security of her separate property" within the meaning of sect. 12 of the Married Women's Property Act, 1882, and is therefore not maintainable.

Decision of Sutton, J. (24 T. L. R. 691) affirmed.

TINKLEY v. TINKLEY, 25 T. L. R. 264; 53 Sol. Jo. 242—C. A.]

##### (3) Wife's Liability for Costs.

[No paragraphs in this vol. of the Digest.]

## X. SEPARATION DEEDS.

[No paragraphs in this vol. of the Digest.]

## XI. MATRIMONIAL CAUSES IN THE HIGH COURT.

## (1) Alimony and Maintenance.

[No paragraphs in this vol. of the Digest.]

## (2) Costs.

16. *Adultery of Petitioner—Intervention of Person with whom Adultery Committed—Rescission of Decree—Costs of King's Proctor—Matrimonial Causes Act, 1907* (7 Edw. 7, c. 12), s. 3.]—Decree of divorce rescinded on the ground of the adultery of the petitioner; and the petitioner and the person with whom she was charged with having committed adultery, and who had obtained liberty to intervene in the proceedings under sect. 3 of the Matrimonial Causes Act, 1907, condemned in the costs of the King's Proctor.

DAVISON v. DAVISON (KING'S PROCTOR SHOWING CAUSE, MONTGOMERIE INTERVENING) [1909] P. 308; 26 T. L. R. 28; 54 Sol. Jo. 13—Deane, J.

17. *King's Proctor—Unsuccessful Intervention—Matrimonial Causes Act, 1878* (41 & 42 Vict. c. 19), s. 2.]—Where the King's Proctor has intervened in a divorce suit and has conducted the intervention proceedings properly in the simple discharge of his duty, it is not the practice of the Court to give costs against him, even though his intervention fails.

HIGGINS v. HIGGINS AND MINOR (KING'S PROCTOR SHOWING CAUSE), [1909] W. N. 214; 26 T. L. R. 36—Bigham, Pres.

18. *King's Proctor—Unsuccessful Intervention—Matrimonial Causes Act, 1878* (41 & 42 Vict. c. 19), s. 2.]—Under sect. 2 of the Matrimonial Causes Act, 1878, the Court has an unfettered discretion as to costs, and one case should not be cited against another with the object of establishing a common practice upon the point. The judge must exercise his discretion according to the circumstances of each case. Unsuccessful intervention by the King's Proctor in a divorce suit dismissed with costs against the King's Proctor.

CARTER v. CARTER (KING'S PROCTOR INTERVENING), [1909] W. N. 239; 26 T. L. R. 84; 54 Sol. Jo. 102—Deane, J.

## (3) Cruelty.

[No paragraphs in this vol. of the Digest.]

## (4) Custody of Children.

[No paragraphs in this vol. of the Digest.]

## (5) Damages.

19. *Voluntary Payment by Foreign Co-respondent in Lieu of Damages.*—The Court sanctioned the voluntary payment of a sum of money in lieu of damages by a co-respondent who was not subject to the jurisdiction of the Court and made a "consent order" that the agreed sum should be paid into Court on the terms agreed.

LUCAS v. LUCAS AND GEORGETTI, 25 T. L. R. [248—Deane, J.

20. *Divorce—Damages against Co-respondent—Liability of Executor of Co-respondent.*—A decree *nisi* being pronounced, the Court condemned the co-respondent in the costs incurred by the petitioner. An order was also made "that the said co-respondent do within one month from the service of this order on him lodge in Court the said sum of £1,500, he undertaking not to part with his property meanwhile except to realise the said sum." Within a month of the order the co-respondent committed suicide without having paid the money into Court. The decree *nisi* was not made absolute until after the co-respondent's death.

HELD—that the Court had no jurisdiction to make an order for payment by the executor of the co-respondent of the damages and taxed costs out of the assets which had come to his hands as executor.

Decision of Bigham, Pres. (25 T. L. R. 412; 53 Sol. Jo. 377) reversed.

BRYDGES v. BRYDGES AND WOOD, [1909] P. 187; [78 L. J. P. 97; 100 L. T. 744; 25 T. L. R. 505—C. A.

## (6) Desertion.

21. *Separation Order by Justices—Subsequent Petition for Divorce—Husband not Guilty of Desertion—Matrimonial Causes Act, 1857* (20 & 21 Vict. c. 85), s. 16—*Summary Jurisdiction (Married Women) Act, 1895* (58 & 59 Vict. c. 39), ss. 4, 5.]—A husband deserted his wife, and about six months afterwards she obtained an order under the Summary Jurisdiction (Married Women) Act, 1895, for separation and payment to her of a weekly sum, upon the ground of his desertion. The husband having subsequently committed adultery, the wife, more than two years after he had deserted her, filed a petition for divorce.

HELD, by the full Court of Appeal—that the husband had not been guilty of desertion for two years, and that the wife was therefore not entitled to a divorce.

Dodd v. Dodd ([1906] P. 189; 94 L. T. 709; 75 L. J. P. 49; 70 J. P. 163; 54 W. R. 541; 22 T. L. R. 484—Barnes, Pres.) followed.

Decision of Bucknill, J. (24 T. L. R. 586) affirmed.

HARRIMAN v. HARRIMAN, [1909] P. 123; 78 [L. J. P. 62; 100 L. T. 557; 73 J. P. 193; 25 T. L. R. 291; 53 Sol. Jo. 265—C. A.

## (7) Discretion of Court.

22. *Petitioner Guilty of Adultery—Refusal by Wife of Conjugal Rights—Discretion of Court to Grant Decree.*—A husband filed a petition for divorce on the ground of his wife's adultery, but subsequently withdrew it on his wife begging forgiveness and promising amendment. Subsequently the wife refused to render the husband conjugal rights, whereupon he went to Boulogne with another woman and lived there in adultery with her for a week. Thereafter the husband and wife agreed to separate, and by the deed of separation it was recited that both of them had committed adultery, which had been mutually



# **XI. Matrimonial Causes in the High Court—** *Continued.*

condoned. The wife having at a later date committed adultery, the husband filed a petition for divorce. The Court granted a decree *nisi*.

ROSENZ *v.* ROSENZ AND JOSTEN, 25 T. L. R. [473; 53 Sol. Jo. 400—Bigham, Pres.

Subsequently on the intervention of the King's Proctor the decree was rescinded (26 T. L. R. 14; 54 Sol. Jo. 13—Deane, J.).

**23. Petitioner Guilty of Statutory Desertion—Divorce—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.]**—The Court will exercise its discretion in favour of a petitioner in a divorce suit, even though guilty of statutory desertion.

MULLEY *v.* MULLEY AND SHAW, 53 Sol. Jo. 469 [—Deane, J.]

**24. Adultery of Petitioner—Petition by Husband—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.]**—The Court will not exercise its discretion in favour of a husband who is petitioning for a divorce, and who has himself committed adultery, if the petitioner's misconduct was committed by him with full knowledge that he was committing adultery.

CRAVEN *v.* CRAVEN AND ROBINSON, 26 T. L. R. 4 [—Deane, J.]

**25. Adultery of Petitioner—Petition by Husband—Condonation—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 31.]**—The Court will not exercise its discretion in favour of a petitioner who has himself committed adultery, notwithstanding the fact that his wife may have condoned the offence.

WAIN *v.* WAIN AND EVES (KING'S PROCTOR [SHOWING CAUSE]), 26 T. L. R. 131; 54 Sol. Jo. 119—Deane, J.]

## **(8) Foreign Divorce.**

**26. Wife's Suit for Judicial Separation—Divorce Proceedings by Husband in Foreign Country—Injunction to Restrain.]**—The fact that a married woman has commenced proceedings in this country against her husband for judicial separation does not give the English Courts jurisdiction to restrain the husband from subsequently asserting and prosecuting his right to take proceedings for divorce in a foreign country where he has acquired a domicile.

Decision of Bigham, Pres. (25 T. L. R. 410; 53 Sol. Jo. 377) reversed.

VARDOPULO *v.* VARDOPULO, 25 T. L. R. 518; [53 Sol. Jo. 469—C. A.]

## **(9) Judicial Separation.**

See No. 11, *supra*.

## **(10) Jurisdiction.**

**27. Adultery Abroad—Co-respondent out of Jurisdiction—Application to be Dismissed from Suit—Practice—Costs.]**—The co-respondent in a divorce suit, a domiciled Dane, was served in Brussels with the petition and citation, which

only alleged adultery at Brussels. He entered an appearance under protest, and then applied to be dismissed from the suit on the ground that he was not subject to the jurisdiction of the Court.

**HELD**—that he was entitled to be dismissed from the suit, but, the adultery being admitted, without costs.

FAIRFAX *v.* FAIRFAX AND DE LA CRUX, 99 L. T. [892; 25 T. L. R. 213—Barnes, Pres.]

**28. Foreign Co-respondent out of Jurisdiction—Entitled to Notice of Proceedings—No Necessity for Actual Citation.]**—A person charged with adultery in a petition is entitled to notice of the proceedings so that, if he wishes, he may clear his character. Therefore if a co-respondent is domiciled and resident out of the jurisdiction, notice of the proceedings must be given to him, though the Court may not require him to be actually served with the petition.

BOGER *v.* BOGER, [1908] P. 300; 77 L. J. P. [151; 99 L. T. 881; 52 Sol. Jo. 552—Deane, J.]

**29. Co-respondent out of Jurisdiction—Application to be Dismissed from Suit—Costs.]**—The co-respondent in a divorce suit, a domiciled Austrian, was served with the citation and petition in Paris. He entered an appearance under protest, and then applied to be dismissed from the suit on the ground that he was not subject to the jurisdiction of the Court. The Court made an order dismissing the co-respondent from the suit, but without costs.

WALTER *v.* WALTER AND BERGMANN, 25 [T. L. R. 473—Bigham, Pres.]

## **(11) Nullity of Marriage.**

See also Nos. 13, 14, *supra*.

**30. Incapacity—Absence of Co-habitation.]**—The incapacity of a wife found as a fact on a statement made by herself.

P. *v.* P. (OTHERWISE G.), 25 T. L. R. 638—[Deane, J.]

**31. Relative Incapacity—Decree at Suit of an Impotent Person—Refusal to Undergo Operation—Validity of Marriage.]**—The Court affirmed, in a modified form, a decree of nullity of marriage pronounced on the wife's petition on the ground of the husband's incapacity, although the evidence showed that the incapacity was only relative to the parties, and not a general condition of the husband.

**HELD**, also, that it was not necessary that a valid marriage as to form should be proved before granting a decree, and that the petitioner's refusal to undergo a harmless operation did not disentitle her to relief.

G. *v.* G. (FALSELY CALLED K.), 25 T. L. R. 328—[C. A.]

**32. Maintenance—Discretion of Court—Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.]**—The power given to the Court by sect. 1 of the Matrimonial Causes Act, 1907, to order, on

# XI. Matrimonial Causes in the High Court— Continued.

decreting dissolution or nullity of marriage, the husband to grant maintenance to the wife, is discretionary. The exercise of this power must depend upon the conduct of the parties, and each case must be decided upon its own circumstances.

Circumstances in which the Court refused to order a husband to grant maintenance to the wife.

DUNBAR (OTHERWISE WHITE) *v.* DUNBAR, 1909 P. 90; 78 L. J. P. 35; 100 L. T. 380; 25 T. L. R. 230—Barnes, Pres.

## (12) Practice.

### (a) Appeals and New Trials.

[No paragraphs in this vol. of the Digest.]

### (b) Arrangement of Lists.

[No paragraphs in this vol. of the Digest.]

### (c) Contents of Petition.

[No paragraphs in this vol. of the Digest.]

### (d) Delay.

[No paragraphs in this vol. of the Digest.]

### (e) Divorce Bill.

33. *Decree à mensa et thoro in Ireland—Co-respondent not within the Jurisdiction—No Action for Damages Instituted against Co-respondent—Evidence—Procedure.*—Where a decree *à mensa et thoro* has been obtained by the husband in the Irish Courts, but owing to the co-respondent cited not being within the jurisdiction no action at law could be brought against him:—

HELD—that, the facts alleged by the petitioner being strictly proved, the House could order a bill to dissolve the marriage of the petitioner with his wife to be read a second time.

TORRENS'S DIVORCE BILL, [1909] W. N. 72; [53 Sol. Jo. 396—H. L.]

### (f) Evidence.

34. *Divorce—Marriage in Schoolroom—Bishop's Licence—Evidence—Church Marriage Act, 1824 (5 Geo. 4, c. 32), s. 1.*—The parties to a divorce suit were married in a schoolroom adjoining a church as the church was at the time undergoing repairs. Evidence was given that the bishop of the diocese had duly licensed the schoolroom for the celebration of divine service and the solemnisation of marriages during the period that the church was undergoing repairs, and the licence having been produced:—

HELD—that the marriage had been validly celebrated.

WILLIAMS *v.* WILLIAMS, 25 T. L. R. 232 [Deane, J.]

35. *Cross-examination of Witness as to having Committed Adultery—Evidence (Further Amendment) Act, 1869 (32 & 33 Vict. c. 68), s. 3.*—The proviso in sect. 3 of the Evidence (Further Amendment) Act, 1869, whereby "no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to

answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceedings in disproof of his or her alleged adultery," refers only to the adultery in issue in the proceedings.

HALL *v.* HALL (KING'S PROCTOR SHOWING [CAUSE]), 25 T. L. R. 524—Bigham, Pres.

36. *Private Inquiry as to Maintenance before Registrar—Right of Witness to be Professionally Represented.*—A witness who has been subpoenaed to attend for examination before a registrar in divorce proceedings is not entitled as of right to have his solicitor present to advise him.

ALLPORT *v.* ALLPORT, 25 T. L. R. 588 [Deane, J.]

### (g) Hearing.

[No paragraphs in this vol. of the Digest.]

### (h) Interlocutory Proceedings.

[No paragraphs in this vol. of the Digest.]

### (i) Intervention of Third Party.

See also Nos. 22, 25, *supra*.

37. *King's Proctor Intervening—Order for Discovery.*—Where the King's Proctor has intervened in a suit, the Court will not make an order upon him to give the petitioner discovery of documents.

D. *v.* D. (KING'S PROCTOR INTERVENING), 25 [T. L. R. 411; 53 Sol. Jo. 359—Bigham, Pres.]

### (j) Notice, Service and Stay of Proceedings.

38. *Citation—Petition—Supplemental Petition—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 42.*—On July 30th, 1908, the husband filed a petition for divorce alleging adultery by his wife with men unknown. On being advised that he had not sufficient evidence to support the charges in the petition he made further inquiries, and on November 7th, 1908, he filed a supplemental petition alleging his wife's adultery with the co-respondent on specific dates in October, 1908, all the charges in the original petition having been struck out.

HELD—that the charges contained in the supplemental petition were covered by the citation which had been served with the petition.

HOLMES *v.* HOLMES AND PAWLS, 25 T. L. R. [263—Barnes, Pres.]

39. *Petition Amended—Respondent in India—Personal Service Dispensed With—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 42.*—When a respondent in India, who had been served with the citation and petition, had not appeared, and the petition was amended by changing the name only of the woman with whom adultery was alleged, the Court allowed personal re-service of the amended petition to be dispensed with.

ROBERTS *v.* ROBERTS, 53 Sol. Jo. 304—Bigham, [Pres.]

# X1. Matrimonial Causes in the High Court— Continued.

**40. Service of Citation Abroad—Proof of Identity.**—Proof of identity of parties served with a citation abroad is often given by a receipt or acknowledgment by the parties served being endorsed upon the citation and by a photograph being also exhibited to the affidavit. If a receipt is given, the handwriting can be identified.

ATTRIDGE *v.* ATTRIDGE AND COX, *Times*, [January 16th, 1909—Barnes, Pres.

**41. Nullity—Notice to Attend Before Medical Inspectors—Proof.**—An affidavit is sufficient proof that notice has been served upon a respondent in a nullity suit to appear before medical inspectors, and has failed to do so.

P. *c.* P. (OTHERWISE A.), 25 T. L. R. 530; 53 [Sol. Jo. 486—Deane, J.

**42. Nullity—Notice to Attend before Medical Inspectors—Proof.**—In nullity suits strict proof is required of service upon the respondent of notice to attend before the medical inspectors, and of the appointment itself.

B. (OTHERWISE W.) *c.* B., 25 T. L. R. 713— [Bigham, Pres.

## (k) Miscellaneous.

**43. Decree—Rectification—Omission of Marriage Ceremony before Registrar.**—A wife having been married to her husband, first at a registry office and afterwards in church, obtained a decree absolute for divorce. In the petition, the decree *nisi*, and the decree absolute only the ceremony in church was referred to.

The Court allowed the decrees to be rectified, upon the petition being amended, and an affidavit of service filed.

HAMPSON *v.* HAMPSON, [1908] P. 355; 77 [L. J. P. 148; 99 L. T. 882; 24 T. L. R. 868; 52 Sol. Jo. 729—Barnes, Pres.

**44. Decree—Rectification—Omission of First Marriage by Declaration before Witnesses—Costs.**—A wife having been married to her husband, first by a declaration before witnesses in Edinburgh, and afterwards at the Sheriff's Court, Edinburgh, obtained a decree *nisi* for divorce. In the petition and the decree *nisi* only the second ceremony was referred to. The Court allowed the petition and the decree *nisi* to be amended by alleging also the first ceremony, but without costs against the respondent.

*Hampson v. Hampson*, *supra*, followed.

MARSHALL *v.* MARSHALL, 25 T. L. R. 716 [Bigham, Pres.

**45. Decree made Absolute less than Six Months after Decree Nisi.**—A decree *nisi* was by special order made absolute less than six months after pronouncement of decree *nisi*.

GULLEY *v.* GULLEY, *Times*, August 2nd, 1909 [Deane, J.

## (13) Divorce.

**46. Wife's Petition—Financial Assistance from Husband's Sister—No Collusion.**—Where a wife, petitioner in a suit for dissolution of marriage, received monetary assistance from her husband's sister (presumably his agent):—

HELD—this was not a collusive arrangement between the petitioner and the respondent.

MALLEY *v.* MALLEY, 25 T. L. R. 662; 53 Sol. Jo. 617—Bigham, Pres.

**47. Decree Granted to Husband on Terms—Payment of Wife's Debts to Certain Amount—Selection by Husband or Pro rata.**—A decree *nisi* was granted on the terms that the petitioning husband should pay his wife's debts not exceeding £60. An application by the wife that her debts, which amounted to £180, should be paid *pro rata* and not as her husband selected was refused with costs.

BLAKENEY *v.* BLAKENEY, *Times*, February 9th, [1909—Barnes, P.

## XII. PROTECTION ORDER.

[No paragraphs in this vol. of the Digest.]

## XIII. RESTITUTION OF CONJUGAL RIGHTS.

[No paragraphs in this vol. of the Digest.]

## XIV. VARIATION OF SETTLEMENTS.

**48. Nullity—Variation of Settlements—Procedure—Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1.**—By a marriage settlement the respondent, the intended husband, transferred certain funds to trustees upon trust for the respondent for life and then for the petitioner for life, with an absolute reversion to the respondent in the event of there being no issue of the marriage. The marriage took place, but on the wife's petition a decree of nullity was made on the ground of the respondent's impotence. In proceedings to vary the settlement the registrar reported that the respondent's income under the settlement was about £274 a year, that he had a further income of £400 a year, and that the petitioner had £97 a year from certain trust funds (not the subject of the settlement), together with a voluntary allowance of £100 a year from her stepmother. The registrar recommended that an order be made upon the trustees to pay out of the funds the subject of the settlement £100 a year to the petitioner for her life. On motion to confirm the registrar's report:—

HELD—that since the decision in *Dormer v. Ward* ([1901] P. 20; 69 L. J. P. 144; 83 L. T. 556; 49 W. R. 149—C. A.) and the Matrimonial Causes Act, 1907, the proper procedure in such a case was to apply under the latter Act for an order to secure an allowance to the wife; and the Court made an order under that Act that £100 a year be secured to the wife *dum sola*, that trustees be appointed, that the matter be referred to the conveyancing counsel to settle a proper deed, and that the trustees should pay the income to the respondent to be by him paid to the petitioner.

SHARPE (OTHERWISE MORGAN) *v.* SHARPE, 1909 P. 20; 78 L. J. P. 21; 99 L. T. 884; 25 T. L. R. 131—Deane, J.



## XIV. Variation of Settlements—Continued.

49. *Practice—Service of Petition on Third Person—Right to be Heard—Objection—Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5—Divorce Rules, r. 97.*—A certified copy of a petition for variation of a settlement was served on M. in accordance with r. 97 of the Divorce Rules. M. filed a reply to the petition, to which the petitioner filed an answer. On an appointment to proceed coming before the registrar, no objection was taken to M.'s appearance. The appointment was adjourned to enable the petitioner to file a further answer to M.'s reply. At the adjourned appointment objection was taken that M. had no interest under the settlement and was not entitled to be heard. The objection was upheld by the registrar, and his order was affirmed by Deane, J. M. appealed.

HELD—that the application that M. be not heard was a wrong application, and that, before making such an application, the petitioner, who had brought M. before the Court as a litigant, should have taken out a summons to get M. discharged from all proceedings on the petition on payment by the petitioner of all costs incurred.

VIVIAN (LORD) v. VIVIAN (LADY) AND CUR-PHEY, [1909] P. 57; 78 L. J. P. 36; 100 L. T. 169; 25 T. L. R. 157—C. A.

## XV. SUMMARY PROCEEDINGS IN MATRIMONIAL CAUSES.

## (a) Cruelty and Drunkenness.

[No paragraphs in this vol. of the Digest.]

## (b) Desertion.

[No paragraphs in this vol. of the Digest.]

## (c) Evidence.

[No paragraphs in this vol. of the Digest.]

## (d) Jurisdiction.

50. *Custody of Children—Allowance—Jurisdiction of Justices to Vary Order as to Custody and Allowance where no Misconduct—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), ss. 4, 7.*—The appellant (the wife) had obtained from justices (1) a separation order; (2) the custody of the two children; and (3) an order for payment to her of 7s. 6d. per week until that order should be altered, varied, or discharged. The order was afterwards varied on the appellant's application by increasing the weekly allowance to 12s. 6d. The appellant became a hospital nurse, which involved leaving the children with her mother. No suggestion was made that the children were not properly cared for. On the respondent's application, the justices again varied their previous order by reducing the weekly allowance to 7s. 6d., and giving the respondent the custody of one of the children.

HELD—that in the absence of misconduct on the part of the appellant, the justices had no jurisdiction to vary their order which gave her the custody of the children, and that as the last order was wrong on the question of the custody of the child, it must be set aside as a whole,

without prejudice, however, to any future application by the respondent for a reduction of the amount of the weekly allowance.

COBBE v. COBBE, 73 J. P. 208; 25 T. L. R. 305 [—Div. Ct.

51. *Order for Payment of Weekly Sum to Wife—Enforcement of Order—No Sufficient Distress—Conviction—Imprisonment—Proof of Means—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 54—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 9.*—Where an order has been made under the Summary Jurisdiction (Married Women) Act, 1895, that a husband shall pay a weekly sum to his wife, such order may be enforced by an order of imprisonment, in default of sufficient distress, without proof that the husband had the means to pay the sum in respect of which he has made default.

R. v. RICHARDSON AND OTHERS, JUSTICES, [EX PARTE SHERRY, [1909] 2 K. B. 851; 101 L. T. 541; 73 J. P. 434; 25 T. L. R. 711—Div. Ct.

## (e) Maintenance.

52. *Weekly Sum Payable under Magistrates' Order—Appointment of Receiver—Equitable Execution—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), ss. 4, 5, 7, 9.*—A weekly sum payable to a married woman by her husband under an order made under the Summary Jurisdiction (Married Women) Act, 1895, is inalienable, and a receiver cannot be appointed by way of equitable execution in respect of such sum.

Watkins v. Watkins ([1896] P. 222; 65 L. J. P. 75; 74 L. T. 636; 12 T. L. R. 456; 44 W. R. 677) followed.

Decision of Phillimore, J., reversed.

PAQUINE v. SNARY, [1909] 1 K. B. 688; 78 [L. J. K. B. 361; 100 L. T. 220; 25 T. L. R. 212—C. A.

## (f) Practice: Appeals, Notes of Proceedings, Costs.

53. *Appeal from Justices—Desertion—Application by Wife to Justices for Order Dismissed—Resumption of Cohabitation after Appeal Lodged—Wife's Costs—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 6.*—A married woman applied to justices for an order under the Summary Jurisdiction (Married Women) Act, 1895, alleging that her husband had deserted her. The justices dismissed the application on the ground that the husband had not deserted the appellant without just cause. The wife appealed, but after the appeal had been lodged the husband published an apology and retraction of the evidence he had given before the justices. The husband and wife resumed cohabitation.

HELD—that the wife was entitled to the costs of the appeal.

PARTINGTON v. PARTINGTON, 73 J. P. 200; 25 [T. L. R. 305—Div. Ct.

## XV. Summary Proceedings in Matrimonial Causes—Continued.

54. *Appeal from Justices*—“*Grounds*” of Decision not Stated in “*Notes*”—*Insufficient Statement of Facts—Desertion—Agreement to Live Apart—Written or Parol.*—At the hearing of an appeal from a separation order granted by justices by reason of the husband's desertion, it appeared from the notice of appeal that it was based upon the justices finding that an agreement to live apart must be in writing, signed and sealed by the parties. For the respondent it was alleged that the justices found, as the “grounds” of their decision, that there had been no agreement to live apart either written or parol. These “grounds” were not in the “notes” supplied to the Court, and appeared to have been communicated to the appellant after notice of appeal had been given. What caused the original separation was not stated.

HELD—that the “grounds” ought to have been set out in the “notes”; that the Court was not able to deal with the appeal as all the facts were not really before it; and that the case must go back for a full rehearing, the respondent to have the costs of the appeal.

BOWEN v. BOWEN, 73 J. P. 87—Div. Ct.

55. *Appeal from Justices—Notes of Evidence—Shorthand Notes—Summary Jurisdiction (Married Women) Act, 1895* (58 & 59 Vict. c. 39), s. 4.]—It is the duty of the justices' clerk, in proceedings under the Summary Jurisdiction (Married Women) Act, 1895, to take a note of the proceedings and of the reasons for the justices' decision.

If the parties desire an ordinary note they are entitled to have it unless a shorthand note is provided free of cost; there is no justification for the parties being put to the extra cost of a shorthand note.

If a shorthand note is taken the justices' clerk ought to verify it.

ROYLE v. ROYLE, [1909] P. 24; 78 L. J. P. 34; [99 L. T. 882; 73 J. P. 40; 25 T. L. R. 84; 53 Sol. Jo. 119—Div. Ct.]

56. *Appeal from Justices—Duty of Solicitors to Furnish Notes of Proceedings before Justices.*—Observations by Bigham, P., as to the duty of the appellant's solicitor in an appeal from justices under the Summary Jurisdiction (Married Women) Act, 1895, to furnish for the use of the Court notes of the evidence before the justices, and of the reasons for the justices' decision.

McHUGH v. McHUGH, 26 T. L. R. 60—Div. Ct.

57. *Appeal—Separation Order—Arrears of Weekly Payments—Appeal from Order for Payment of Arrears—Summary Jurisdiction (Married Women) Act, 1895* (58 & 59 Vict. c. 39), ss. 9, 11—*Bastardy Laws Amendment Act, 1872* (35 & 36 Vict. c. 65), s. 4.]—An appeal does not lie to a Divisional Court of the Probate, Divorce, and Admiralty Division from an order merely enforcing the payment of arrears of maintenance due under a separation order made under the

Summary Jurisdiction (Married Women) Act, 1895.

*Ruther v. Ruther* ([1903] 2 K. B. 270; 72 L. J. K. B. 826; 67 J. P. 359—Div. Ct.) followed.

GRIFFITHS v. GRIFFITHS, 73 J. P. 391; 25 [T. L. R. 544; 53 Sol. Jo. 504—Div. Ct.]

58. *Costs—Unsuccessful Appeal by Wife.*—Appeal by a married woman from the refusal of a metropolitan police magistrate to grant her a separation order dismissed without costs.

JACKSON v. JACKSON, 25 T. L. R. 713—Div. Ct.

## IDIOTS.

See LUNATICS AND PERSONS OF UNSOUND MIND.

## ILLEGAL ARREST AND IMPRISONMENT.

See CRIMINAL LAW; TRESPASS.

## ILLEGAL CONTRACTS.

See CONTRACT.

## ILLEGITIMACY.

See BASTARDY.

## IMBECILITY.

See LUNATICS.

## IMMIGRATION.

See ALIENS.

## IMMORAL CONTRACTS.

See CONTRACT.

## IMPRISONMENT.

See CRIMINAL LAW AND PROCEDURE; PRISONS AND REFORMATORIES.

## IMPROVEMENT OF LAND.

See REAL PROPERTY AND CHATTELS  
REAL.

## INCLOSURE.

See COMMONS; COPYHOLDS AND MANORS;  
HIGHWAYS; OPEN SPACES.

## INCOME AND CAPITAL.

See REAL PROPERTY AND CHATTELS  
REAL; SETTLEMENTS; TRUSTS;  
WILLS.

## INCOME TAX.

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### I. TAXABLE INCOME.

#### (a) In General.

1. "Easter Offerings"—*Vicar of Parish*—*"Profits Accruing by Reason of such Office"*—*Income Tax Act, 1842* (5 & 6 Vict. c. 35), s. 146, *Sched. E., r. 1*.—"Easter offerings" given to the vicar of a parish, though voluntary personal gifts, are profits accruing to him by reason of his office, and are therefore assessable to income tax under *Sched. E.*

Decision of C. A. ([1907] 2 K. B. 688; 76 L. J. K. B. 1041; 97 L. T. 531; 23 T. L. R. 663) affirmed.

BLAKISTON v. COOPER, [1909] A. C. 104; 78 [L. J. K. B. 135; 100 L. T. 51; 25 T. L. R. 164; 53 Sol. Jo. 149—H. L.]

2. *Exemption—University College—Charitable Purpose—Income Tax Act, 1842* (5 & 6 Vict. c. 35), s. 61 (*No. VI., Sched. A*); s. 88 (*Sched. C, r. 3*); s. 105 (*Sched. D*).—The University College of North Wales, founded by charter for the purpose of giving professional and commercial education, managed by a governing body having complete control, subject to the terms of the charter, of the college property, and supported by voluntary donations, devises and bequests, by a Government grant, and by payments by pupils, claimed exemption from income tax under *Scheds. A, C, and D* of the *Income Tax Act, 1842*, on the ground that the object of the college was a charitable purpose.

HELD—that the funds in the hands of the governing body were funds for the advancement of education, that the governors were trustees for charitable purposes to which the sums received by them were applied, and that therefore the college was entitled to the exemption claimed.

*Income Tax Commissioners v. Pemsel* ([1891] A. C. 531) followed.

Decision of Div. Ct. (72 J. P. 195; 98 L. T. 446; 24 T. L. R. 491; 52 Sol. Jo. 395; [1908] W. N. 92) affirmed.

R. v. SPECIAL COMMISSIONERS OF INCOME TAX, [EX PARTE UNIVERSITY COLLEGE OF NORTH WALES, [1909] W. N. 57; 78 L. J. K. B. 576; 100 L. T. 585; 25 T. L. R. 368; 53 Sol. Jo. 320—C. A.]

3. *Gains and Profits—Sales of Land—Income Tax Act, 1842* (5 & 6 Vict. c. 35).]—The Hudson's Bay Company—a company incorporated by Royal Charter which contained no provisions as to profits—sold portions of its lands, and with the proceeds reduced the capital of the company by £2 a share.

HELD—that the amount received by the company on the sale of its land was not chargeable with income tax as gains and profits within the meaning of the *Income Tax Act*.

STEVENS v. HUDSON'S BAY CO., 101 L. T. 96; [25 T. L. R. 709—C. A.]

#### (b) Profits earned Abroad.

4. *Company Registered in England—Deductions—Profits Tax Imposed in Transvaal—Income Tax Acts, 1842* (5 & 6 Vict. c. 35), s. 100, and 1853 (16 & 17 Vict. c. 34), s. 2, *Sched. D*.]—A company registered in England which carried on gold mining in the Transvaal showed profits calculated on the average of three years' results ended December 31st, 1902, amounting to £25,666. During 1902 an Imperial tax of 10 per cent. was imposed in the Transvaal upon the net annual produce of gold mines in that colony, which tax was paid to the British Government.

HELD—that in ascertaining the amount of profits chargeable with income tax the amount paid in respect of the profits tax in the Transvaal could only be allowed as an average over the three years.

STEVENS (SURVEYOR OF TAXES) v. DURBAN [ROODEPOORT GOLD MINING CO., 100 L. T. 481; 25 T. L. R. 316—Channell, J.]

5. *Interest from Foreign Investments—Received in Great Britain—Income Tax Act, 1842* (5 & 6 Vict. c. 35), s. 100, *Sched. D, Case IV*.]—The interest arising from an insurance company's investments abroad was reinvested in further similar investments, without being remitted home.

HELD—that as the interest had not been remitted home either in specie or in any of the forms of remittance known to commerce, it had not been "received" in this country in the sense of sect. 100 of the *Income Tax Act, 1842*, and



### 1. Taxable Income—*Continued.*

that accordingly it was not chargeable with duty under Case IV. of Sched. D of the Act.

*Gresham Life Assurance Society v. Bishop* ([1902] A. C. 287) followed.

SCOTTISH WIDOWS' FUND LIFE ASSURANCE [SOCIETY v. INLAND REVENUE, [1909] S. C. 1372; 46 Sc. L. R. 993—Ct. of Sess.]

## II. ASSESSMENT AND COLLECTION.

### (a) In General.

6. *Incorrect Statement of Income—Not Fraudulent—Negligence—Penalty—Income Tax Act, 1842* (5 & 6 Vict. c. 35), s. 55.]—A person who has delivered a statement of his income chargeable with income tax which, through negligence or carelessness, but without fraud, is incorrect, is liable to the penalty of £50 under sect. 55 of the Income Tax Act, 1842.

*Lord Advocate v. Savers* ((1898) 25 R. 242; 35 Sc. L. R. 190—Ct. of Sess.) followed.

Decision of C. A. ([1909] 1 K. B. 694; 78 L. J. K. B. 708; 100 L. T. 275; 25 T. L. R. 342) reversed.

ATTORNEY-GENERAL v. TILL, [1909] W. N. 219; 26 T. L. R. 134; 54 Sol. Jo. 132—H. L.

7. *Interest on Loans from Bankers—Claim for Return.*]—A suppliant petitioned the Crown for the return of a sum of money which he had paid as income tax. He had for many years been in the habit of borrowing sums from his bankers in London for the purpose of investing them in various dividend-paying stocks and shares. Out of the taxed dividends he paid the interest on the loans from the bankers. In January, 1907, he applied to the Board of Inland Revenue for a return of income tax in respect of this interest. The Board returned to him part of the sum claimed, but refused to refund that which represented income tax on the interest charged for a loan by a provincial bank, but transferred to his usual bankers, within a period of less than twelve months.

HELD—that, assuming the suppliant might have deducted the income tax when he made the payment for interest on the loan from the provincial banking company, or could have recovered from them the amount of the income tax which he might have so deducted, yet the fact that he had not made the deduction gave him no right to claim the amount from the Board of Inland Revenue; that the banking company only paid income tax on the total amount of their profits, and they had not also paid income tax on the particular loan in question; and that the Board could not be ordered to refund what they had not actually received.

Decision of Lawrance, J., affirmed.

DE PEYER v. R., 100 L. T. 256—C. A.

8. *Repayment by Inland Revenue of Income Tax Found by Court not Due—Interest—Rate Allowed.*]—In a case (No. 5, *supra*) where the Court found that income tax on the revenue from foreign securities of an insurance company

was not due, and ordered the repayment of the sum paid, it allowed interest at 4 per cent.

SCOTTISH WIDOWS' FUND LIFE ASSURANCE [SOCIETY v. INLAND REVENUE, [1909] S. C. 1372; 46 Sc. L. R. 993—Ct. of Sess.]

### (b) Deductions.

9. *Reconstruction of Tramways—Wear and Tear—Customs and Inland Revenue Act, 1878* (41 & 42 Vict. c. 15), s. 12.]—In assessing the profits arising from horse tramways belonging to the London County Council for the purpose of income tax the practice had been adopted of deducting the amounts actually expended in each year on repairs and renewals instead of estimating the deduction to be made for the diminished value by reason of wear and tear under sect. 12 of the Customs and Inland Revenue Act, 1878. The council reconstructed thirty-eight miles of track in order to use electric traction, of which five miles were quite worn out, and would have had to have been reconstructed for horse traction. The remaining thirty-three miles of rails were not worn out, but had a life very much less than the average life of a rail. A number of cars used for horse traction and which were not worn out were also discarded and others substituted. The Income Tax Commissioners, in assessing the profits, allowed as a deduction from profits the amount that would have been spent in reconstructing, in a manner suitable for horse traction, the five miles of line which were worn out, but allowed no deduction either in respect of the other thirty-three miles of line reconstructed or in respect of the cars not worn out.

HELD—that an appeal by the London County Council must be dismissed, as no question of law was raised.

HELD FURTHER—that the practice adopted, although convenient in fact, was not applicable to the circumstance of the case, and that the appellants could not complain, as they had received all that they were entitled to under it.

LONDON COUNTY COUNCIL v. EDWARDS (SURVEYOR OF TAXES), 100 L. T. 444; 73 J. P. 213; 25 T. L. R. 319—Channell, J.

10. *Tied House—Compensation Levy—Deduction from Brewery Company's Profits and Gains—Income Tax Act, 1842* (5 & 6 Vict. c. 35), s. 100—*Licensing Act, 1904* (4 Edw. 7, c. 23), s. 3.]—The compensation levy paid by a brewery company under the Licensing Act, 1904, in respect of licensed premises, which the company own and let to tenants as tied houses for a consequently small rent, may be deducted in arriving at the assessable amount of the company's profits and gains under Sched. D to the Income Tax Act, inasmuch as it is a payment essential to the earning of their profits.

Decision of Channell, J. ([1909]) 1 K. B. 711; 78 L. J. K. B. 492; 100 L. T. 541; 73 J. P. 244; 25 T. L. R. 353, reversed (Kennedy, L.J., dissenting).

SMITH v. THE LION BREWERY CO., LD., [1909] 2 K. B. 912; 78 L. J. K. B. 1089; 101 L. T. 145; 73 J. P. 447; 25 T. L. R. 748; 53 Sol. Jo. 696—C. A.

**II. Assessment and Collection—Continued.**

**11. Insurance Premium—Lease—Covenant by Lessor to Pay Premium—Annual Value of Premises—Income Tax, Sched. A—Inhabited House Duty—Finance Act, 1905 (5 Edw. 7, c. 4), s. 6 (3)—Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, Sched. A.]**—By sect. 6 (3) of the Finance Act, 1905, "the annual value of any property which has been adopted for the purpose either of income tax under Scheds. A and B in the Income Tax Act, 1853, or of inhabited house duty, during the year ending on the 5th day of April, 1905, shall be taken as the annual value of such property for the same purpose during the next subsequent year." This provision does not apply to the metropolis.

**HELD**—that, so far as premises outside the metropolis were concerned, the annual value adopted during the previous year was conclusive for the following year for the purposes of income tax and inhabited house duty.

*Seemle*, that where lessors pay the fire insurance premium on premises pursuant to a covenant to do so, such premium cannot be deducted from the rent payable to them by the lessee in order to arrive at the annual value of the premises for the purpose of assessment to income tax and inhabited house duty.

**TURNER v. CARLTON**, [1909] 1 K. B. 932; 78 [L. J. K. B. 378; 100 L. T. 400—Channell, J.

**12. Tax Deducted from Annuities Payable by Insurance Company—Annuities Payable from Profits or Gains brought into Charge**—*Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 24, sub-s. 3.*—An insurance company in consideration of certain money payments granted annuities which were charged on the whole funds of the company. The company had a large income from invested capital from which income tax was deducted at the source, and the amount so paid was larger than if the company had been assessed on profits under Sched. D. The income from invested capital was much larger than the sum paid each year as annuities. The company also had an income from premiums, etc., not taxed at the source. No particular fund was set apart, earmarked, or specially charged in the books of the company with the payment of the annuities. In paying the annuities the company deducted the amount of the income tax due in respect thereof, and retained the amount of the tax so deducted.

**HELD**—that the company was entitled to retain the amount of the tax so deducted, inasmuch as where annuities such as those payable by the company are charged upon a tax-bearing fund amply sufficient to pay them in full, though not set apart for that purpose, they cannot be held to be "not payable" or "not wholly payable" out of profits or gains brought into charge within the meaning of sect. 24, sub-sect. 3, of the Customs and Inland Revenue Act, 1888.

Decision of the Court of Session ([1909] S. C. 847; 46 Sc. L. R. 499) reversed.

**EDINBURGH LIFE ASSURANCE CO. v. LORD [ADVOCATE]**, [1909] W. N. 257; 26 T. L. R. 146; 54 Sol. Jo. 133; 47 Sc. L. R. 94—H. L.

**III. DEDUCTION OF TAX FROM RENT OR ANNUAL PAYMENTS.**

[No paragraphs in this vol. of the Digest.]

**INCORPOREAL HEREDITA-  
MENTS.**

*See* REAL PROPERTY AND CHATTELS  
REAL.

**INDECENT ASSAULT.**

*See* CRIMINAL LAW.

**INDECENT EXPOSURE.**

*See* CRIMINAL LAW.

**INDEMNITY.**

*See* AGENCY; GUARANTEE; MASTER AND  
SERVANT, No. 27; SHIPPING, No. 13;  
STOCK EXCHANGE, No. 1.

**INDIA.**

*See* DEPENDENCIES AND COLONIES.

**INDICTMENTS AND IN-  
FORMATIONS.**

*See* CRIMINAL LAW AND PROCEDURE.

**INDUSTRIAL, PROVIDENT,  
AND SIMILAR SOCIETIES.**

*See* CLUBS; FRIENDLY SOCIETIES;  
TRADE AND TRADE UNIONS.

**1. Dissolution—Property not Transferred at Date of Dissolution—Bona Vacantia—Not Claimed by Crown—Appointment of Trustee by Court—Vesting Order—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 58, 61—Trustee Act, 1893 (56 & 57 Vict. c. 53) ss. 25 (1), 26, 35 (1).**—A society registered under the Industrial and Provident Societies Act, 1893, became legally dissolved, under sects. 58 and 61 of that Act, as from the date of the advertisement of an instrument of dissolution and before certain realty and debts due to the society had been transferred to the persons appointed under the scheme of dissolution to see to the realisation

**Industrial, Provident, and Similar Societies—**  
*Continued.*

and distribution of the society's assets. These persons were therefore unable to sue for the debts or to get in the legal estate of the realty, and now applied to the Court for the appointment of one of their number as trustee, under sect. 25 of the Trustee Act, 1893, in place of the dissolved society, and for a vesting order under sect. 26. The Crown, having been served with the petition, did not claim the property as *bona vacantia*.

**HELD**—that after the execution of the instrument of dissolution the society became a trustee within the meaning of the Trustee Act, 1893, and that therefore a new trustee could be appointed by the Court and a vesting order made under sects. 25 and 26 (i).

IN RE RUDDINGTON LAND. [1909] 1 Ch. 701; 78 L. J. Ch. 378; 100 L. T. 648—Parker, J.

**2. Power of Members to Withdraw the Whole or any Part of their Share Subscription—Effect of Partial Withdrawals in Regard to Liability for Calls in Winding-up Proceedings—Death not Necessarily a Cesser of Membership—Repayment of Advances from Society not Necessarily Cesser of Membership—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 21, 23, 25, 31, 40, 58, 60.**—An industrial and provident society, which was governed by the Industrial and Provident Societies Act, 1893, allowed its members to withdraw at any time the whole or any part of what they had paid on their shares.

The society having gone into liquidation, it was held on the interpretation of the rules of the society, read with the Act of 1893, that where a member had withdrawn a part only of his share subscription this partial withdrawal had the effect of increasing his liability for calls in the winding-up proceedings, and this was so even though he had previously paid up his shares in full; that death did not necessarily operate as a cesser of membership; and that, unless the deceased's executors had demanded a year before the winding-up proceedings the repayment in full of what the deceased had subscribed on his shares, the deceased's estate was liable for the unpaid amount on his shares.

It was also held that where a member had applied for one share in order to become a member and for the purpose of obtaining an advance from the society, the repayment of his advance did not act as a cesser of membership, and that he was liable in the winding-up proceedings to pay the unpaid amount on his share.

*In re West London and General Permanent Benefit Building Society* ((1898) 78 L. T. 393; 14 T. L. R. 304—C. A.) distinguished.

IN RE UNITED SERVICE SHARE PURCHASE [SOCIETY, LD., [1909] 2 Ch. 526; 78 L. J. Ch. 713; 101 L. T. 273—Neville, J.

**3. Winding-up Petition—Principles on which the Court acts in Making such Orders—Jurisdiction—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39).**—Where a petition

has been presented for compulsory winding-up in the case of a company registered under the Industrial and Provident Societies Act, 1893, the Court has full jurisdiction to make an order for compulsory winding-up or for voluntary winding-up under the supervision of the Court, or to dismiss the petition altogether. In such a case the smallness of the assets is not a ground for refusing an order for compulsory winding-up, but where there is no question requiring investigation by the Court, and no difficulty in getting in the assets, and the integrity and ability of the liquidator appointed in voluntary liquidation proceedings is unimpeachable, the Court will dismiss the petition for compulsory winding-up and allow the voluntary winding-up to continue.

IN RE BELFAST TAILORS' CO-PARTNERSHIP, [LD., [1909] 1 I. R. 49; 43 I. L. T. 24—Meredith, M.R., Ireland.

**INDUSTRIAL SCHOOLS.**

See PRISONS AND REFORMATORIES.

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**INFANTS.**

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See also BASTARDY; CONFLICT OF LAWS; CRIMINAL LAW, Nos. 46, 47; EDUCATION, Nos. 8, 9, 10, 11; HUSBAND AND WIFE; INTOXICATING LIQUORS, No. 18; MASTER AND SERVANT, Nos. 22, 23, 25, 55; NEGLIGENCE, Nos. 2, 8, 9; POOR LAW; SETTLEMENTS, No. 1; TRADE, No. 5; TRUSTS, No. 9.

**I. CUSTODY OF INFANTS.**

**1. Parents' Right—Habeas Corpus—Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 3.**—L., on the occasion of her second marriage, placed her infant daughter, then nine months old, with her father and mother, S. and his wife, with whom the child remained until she was



**I. Custody of Infants—Continued.**

seven and a half years old, at which time M. applied that a conditional order for a writ of *habeas corpus* to cause S. and his wife to hand back her infant daughter to her should be made absolute.

**HELD**—that the handing over of her child on her second marriage to her father and mother by M. did not amount to “unmindfulness of her parental duties” within the meaning of the Custody of Children Act, 1891, that the mother of the child was, in the circumstances, a “fit” person to have the custody of the child within the meaning of the said Act, and that, therefore, the conditional order for a writ of *habeas corpus* should be made absolute.

IN RE M. E. BELL (AN INFANT), 43 I. L. T. 35  
[Div. Ct., Ireland.]

**2. Desertion by Parents—Parent's Right to Regain Custody—Writ of Habeas Corpus—Custody of Children Act, 1891 (54 & 55 Vict. c. 3), s. 3.**—The Court will not grant a writ of *habeas corpus* to a parent for the restitution of his child unless they are satisfied such parent is a fit person, having regard to all the circumstances of the case, and especially to the interests of the child, to have the control of the child.

A husband who has had frequent quarrels with, and separations from, his wife is not a fit person, as there is nothing in the nature of permanency in his home.

IN RE M. SKEFFINGTON (AN INFANT), 43 I. L. T.  
[245—Div. Ct., Ireland.]

**II. GUARDIANSHIP.**

[No paragraphs in this vol. of the Digest.]

**III. LIABILITY OF INFANTS.****(a) Contracts.**

**3. Advance of Money—Promissory Note—Misrepresentation as to Age—Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1.**—The defendant, when under 21 years of age, borrowed from the plaintiff £500 and signed a promissory note for £700 payable in 4½ months. The defendant, at the time of the loan, represented to the plaintiff that he was over 21 years of age.

**HELD**—that the contract was void under the Infants Relief Act, 1874, and that the defendant was not estopped from relying on the statute by the fact that he had misrepresented his age.

Decision of Ridley, J. (24 T. L. R. 801) reversed.

LEVENE v. BROUGHAM, 25 T. L. R. 265; 53  
[Sol. Jo. 243—C. A.]

**4. Contract of Service—Clauses in Restraint of Trade—Restrictions Severable—Benefit of Infant.**—A contract of service entered into by an infant and containing clauses in restraint of trade, some reasonable and others unreasonable, is binding on the infant to the extent of the reasonable clauses if the reasonable and unreasonable clauses are severable and the effect of the reasonable restrictions is not to prevent the

whole contract, when the unreasonable clauses are rejected, from being for the benefit of the infant.

BROMLEY v. SMITH, [1909] 2 K. B. 235; 78  
[L. J. K. B. 745; 100 L. T. 731—Channell, J.]

**(b) Necessaries.**

[No paragraphs in this vol. of the Digest.]

**(c) Torts.**

[No paragraphs in this vol. of the Digest.]

**IV. PROPERTY OF INFANTS.**

**5. Real Estate of Infant—Sale by Order of Court to Pay Costs—Surplus—Conversion.**—By an order of Court the whole of some real estate belonging to an infant was sold in order to pay certain costs. He subsequently married and died intestate.

**HELD**—that the surplus proceeds descended as personality to the next of kin.

STEED v. PREECE ((1874) L. R. 18 Eq. 192; 43 L. J. Ch. 687) followed.

Decision of Eve, J. ([1908] 1 Ch. 880; 77 L. J. Ch. 432; 98 L. T. 668) reversed.

BURGESS v. BOOTH, [1908] 2 Ch. 648; 78 L. J.  
[Ch. 32; 99 L. T. 677—C. A.]

**INFECTIOUS DISEASES.**

See ANIMALS; PUBLIC HEALTH.

**INHABITED HOUSE DUTY.**

See INCOME TAX, No. 11.

**INHERITANCE.**

See DESCENT AND DISTRIBUTION; REAL PROPERTY AND CHATTELS REAL.

**INJUNCTIONS.**

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See also COMPANIES, Nos. 23, 24, 32;  
COPYRIGHT, No. 7;  
RAILWAYS AND CANALS, Nos. 34,  
35; TRADE MARKS AND DESIGNS,  
No. 14.

**I. INTERLOCUTORY.**

**1. Balance of Convenience—Local Authority Altering Highway—Blocking Access to House—**

**I. Interlocutory—Continued.**

*Public Health Act, 1875* (38 & 39 Vict. c. 55), ss. 1, 144, 149, 308.—By a special Act a local authority were empowered to acquire (and did acquire) a bridge with the approaches thereto, with power to "alter," &c., the bridge and the approaches thereto, and for that purpose to acquire land by agreement under and subject to the provisions of the *Public Health Act, 1875*. The approaches to the bridge were a highway. A. was the owner of a house bordering on and having a door giving access to the highway. The local authority, without agreeing with A., proceeded to alter the highway and construct other works, so as to block the access to A.'s house from the highway and otherwise to interfere with her premises. A. brought an action against the local authority to restrain them from continuing their operations, and applied for an interlocutory injunction. The local authority claimed to justify their proceedings under sect. 149 of the *Public Health Act, 1875*, and alleged that A.'s only remedy was compensation under sect. 308 of that Act.

HELD, without deciding the point of law—that on the balance of convenience and inconvenience it was not a case for an interlocutory order, for that, if A. succeeded at the trial, the Court would not hesitate to grant a mandatory order for the removal of the works interfering with her premises, and that, if she was only entitled to compensation, she had a defendant capable of paying her full compensation.

ARNOTT *v.* WHITBY URBAN DISTRICT COUNCIL.  
[*(No. 1)*, 73 J. P. 64—Neville, J.]

**2. Interim Injunction—Restraining Person from Following Trade or Profession.**—*Per* Vaughan Williams, L.J.: The Court ought not to grant an interim injunction restraining a person from following his trade or profession if it is satisfied that to do so may prevent such person from earning his livelihood, unless conditions are imposed to prevent such a result from ensuing.

PALACE THEATRE, LD. *v.* CLENSY AND HACK-  
[NEY AND SHEPHERD'S BUSH EMPIRE  
PALACES, LD., 26 T. L. R. 28—C. A.]

**II. MANDATORY.**

**3. Injunction to Restrain Breach—Agreement Negative in Form, but Affirmative in Substance.**—An agreement by an agent not to give notice to leave his principal's service is, though negative in form, affirmative in substance, and ought not to be enforced by injunction.

*Davis v. Foreman* [1894] 3 Ch. 651; 33 W. R. 168—Kekewich, J.) followed.

KIRCHNER & Co. *v.* GRUBAN, [1909] 1 Ch. 413;  
[78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo.  
151—Eve, J.]

**III. GENERAL.**

**4. Complaint by Attorney-General—Case Proved—Right to Injunction.**—The Attorney-General, coming to complain that a public body

is exceeding its powers, or committing some offence against a statute, is not entitled as a matter of right to say that, in all circumstances, on proving his case, the Court is bound to grant an injunction.

ATTORNEY-GENERAL *v.* BIRMINGHAM TAME,  
[AND REA DISTRICT DRAINAGE BOARD,  
[1909] W. N. 235; 26 T. L. R. 93—C. A.]

**5. Sale of Growing Timber—Seller Forcibly Preventing Due Execution of Contract—Remedy of Purchaser—Injunction—Damages.**—By contracts contained in letters, the defendant sold to the plaintiffs certain growing timber on his estates, the plaintiffs being entitled to enter on the estates with their servants to fell the timber, to erect saw mills for the purpose of cutting it up, and to remove the timber when so cut up. Considerable sums were paid by the plaintiffs to the defendant under these contracts and the plaintiffs erected saw mills, bothies for their workmen, and other erections on the estates, and they removed a considerable part of the timber. The defendant then purported to repudiate the contracts, and forcibly, by his servants and agents, prevented the plaintiffs from entering on the estates to cut the timber, pulled down the saw mills and bothies erected by the plaintiffs, and carried away parts of the machinery. In an action by the plaintiffs for an injunction to restrain the defendant from preventing the due execution of the contracts, and for damages:—

HELD—that in such a case damages only would not be an adequate remedy for what the plaintiffs had suffered, and that they were entitled to an injunction as well as damages.

JAMES JONES AND SONS, LD. *v.* THE EARL OF  
[TANKERVILLE, [1909] 2 Ch. 440; 78 L. J.  
Ch. 674; 101 L. T. 202; 25 T. L. R. 714—  
Parker, J.]

**6. Injunction to Restrain Distress for Fine Imposed on Company—Motion by Receiver for Debenture-holders—Clean Hands.**—A receiver for debenture-holders moved for an injunction to restrain the defendants from distraining on the company's goods for payment of a fine inflicted on the company for selling adulterated milk, on the ground that the goods were not the company's, but the debenture-holders'. The receiver had himself committed the offence of which the company was convicted.

HELD, without deciding the question of the debenture-holders' rights—that the receiver could not be entitled to any relief in equity as he did not come with clean hands.

JARVIS *v.* ISLINGTON BOROUGH COUNCIL AND  
[LANE, 73 J. P. N. C. 323—Warrington, J.]

**INJURIES TO PASSENGERS.**

See NEGLIGENCE: RAILWAYS.

**INNS AND INNKEEPERS.**

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I. DUTY TO RECEIVE GUESTS.	
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**II. LIABILITY FOR LOSS OF GOODS.**

1. *Guest—Guests' Accommodation Paid for by other Person—One Club Entertaining Another.*

—The B. hockey club arranged with an innkeeper for the use of a "changing" room for two hours on Saturday afternoons during the season; he charged so much for the room, and supplied tea at so much per head to the B. club team and the visiting team.

On one afternoon the room was entered during the match, and the watches belonging to the visiting players were stolen. They afterwards had tea as usual in another room in the inn.

**HELD**—that the innkeeper was liable to the visiting team for the loss of their watches, although they were not themselves going to pay him for the accommodation and tea provided for them.

**WRIGHT v. ANDERTON**, [1909] 1 K. B. 209; [78 L. J. K. B. 165; 100 L. T. 123; 25 T. L. R. 156; 53 Sol. Jo. 135—Div. Ct.]

**INNS OF COURT.**

*See BARRISTERS.*

**INQUEST.**

*See CORONER.*

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*See LUNATICS.*

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**INSURANCE.**

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<i>See also INCOME TAX, Nos. 11, 12.</i>	

**I. ACCIDENT.**

1. *Accident Direct or Proximate Cause of Death—Disease or Other Intervening Cause—Pneumonia Caused by Exposure to Wet.*—A policy of insurance against accident provided for the payment of a sum of money to the insured's personal representative if the insured should sustain any bodily injury caused by violent, accidental, external, and visible means, and if such injury should within three months of the accident directly cause the death of the insured; and the policy further provided that "this policy only insures against death . . . where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening



**I. Accident—Continued.**

cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." The insured when hunting was thrown off his horse and got wet. In consequence he suffered a severe shock to the nervous system whereby the general vitality of his body was impaired. He then rode home. The next day the insured travelled to London and transacted business there. The journey to London and the day's work there impaired still further his vitality, and on that afternoon he developed pneumonia, from which he died. Pneumonia was caused by the germ called pneumo-coccus, which was generally present in the normally healthy, but which multiplied when the vitality became impaired and caused pneumonia.

**HELD**—that the death was caused by an accident within the meaning of the policy.

Decision of Channell, J. (24 T. L. R. 784; 52 Sol. Jo. 661) affirmed.

**IN RE ETHERINGTON AND LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE CO.,** [1909] 1 K. B. 591; 78 L. J. K. B. 684; 100 L. T. 568; 25 T. L. R. 287; 53 Sol. Jo. 266—C. A.

**2. Coupon Insurance Policy—Conditions of Policy—Claim to be Made within Twelve Months of the Registration of the Holder's Name—Liability of Company.**—A coupon insurance policy against accident was issued by the appellant company, which provided that a claim by the assured must be made within twelve months of the registration of the holder's name. H. filled up the coupon, and sent it, together with the requisite premium, to the company for registration on December 25th, 1905. On January 4th, 1906, he received a letter, dated the previous day, enclosing an official acknowledgment, dated December 29th, 1905. The company did not, in fact, keep a regular register of the names, but in practice the applications were stamped, dated, and filed on being received, after which intimation was sent to the holder of the coupon, stating that the coupon had been duly received and registered. On December 28th, 1906, H. was injured in a railway accident, and died on December 29th, and his widow made a claim to the company on January 2nd, 1907.

**HELD**—that it was on the appellant company to prove the date of registration and that they had failed to prove that the claim was not made within twelve months of registration of the deceased's name, and that the balance of probabilities being also against them, they were liable on the policy.

Decision of the First Division of the Court of Session ([1909] S. C. 344; 46 Sc. L. R. 150) affirmed.

**GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, LD. v. ROBERTSON (OR HUNTER),** [1909] A. C. 404; 101 L. T. 135; 25 T. L. R. 685; 53 Sol. Jo. 619; [1909] S. C. (H. L.) 30; 46 Sc. L. R. 786—H. L.

**II. FIRE.**

[No paragraphs in this vol. of the Digest.]

**III. GENERAL.**

See also **ARBITRATION, No. 6; BANKRUPTCY, No. 32.**

**3. Employers' Liability—Deposit—Irish Company—Authorised Investments—Employers' Liability Insurance Companies Act, 1907 (7 Edw. 7, c. 46)—Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907.**—By virtue of the Employers' Liability Insurance Companies Order, 1907, adapting the provisions of the Life Assurance Companies Act, 1870, every company carrying on the business of employers' liability insurance within the United Kingdom must deposit £20,000 with the Paymaster-General "for and on behalf of the Supreme Court of Judicature, to be invested by him under the direction of the Court" in securities usually accepted by the Court for the investment of funds under its administration, the company selecting the particular securities; "Court" is defined to mean, in the case of a company registered or having its head office in Ireland, the Chancery Division of the High Court in Ireland. An Irish company, having resolved to carry on employers' liability business, obtained an order of the Court of Appeal in Ireland that the £20,000 duly deposited with the Paymaster-General should be partly invested in stocks authorised by the Chancery Division in Ireland but not by the Chancery Division in England. The Assistant Paymaster-General having refused to act on this order, the company now petitioned the High Court in England to sanction the investments.

**HELD**—that, having regard to the words "Supreme Court of Judicature," a contrary intention was indicated to which the general definition of Court was subject, that the Chancery Division of the High Court in England had jurisdiction and that only investments authorised by that Court could be sanctioned.

**IN RE IRISH CATHOLIC CHURCH PROPERTY** [INSURANCE CO., [1909] W. N. 69—Parker, J.

**IV. LIFE.**

See also **BANKRUPTCY, No. 21.**

**(a) Avoidance of Policy and Recovery of Premium: Insurable Interest.**

**4. Avoidance of Policy—Misstatement Bonâ fide made—Concealment—Material Fact—Answers to Medical Officer—Basis of Contract.**—In a proposal in 1902 for a policy on her life the applicant answered certain questions and signed a declaration that to the best of her knowledge and belief the particulars given were true, and she agreed that the proposal and declaration should be the basis of the contract. Subsequently the insurance company sent a document to Dr. S., a doctor selected by them, which stated that a proposal for insurance had been made, and the company submitted the case to him, requesting him to obtain answers from the applicant to the questions on the paper, and to make such investigation as to her health as would enable him to

IV. Life *Continued.*

give the company his opinion. The document then went on:—"Questions to be put to the applicant (with any necessary explanation) by the medical officer, who will fill in the applicant's answers." Then followed a list of questions relating to the health of the applicant and of the members of her family, questions 7 and 9 being—"(7) What medical men have you consulted? When? and what for?" Answer—"Dr. T., rarely; colds.—Dr. H., last spring; measles." "(9) Have you at any time had, and, if so, when, any of the following ailments, viz.:— . . . (b) . . . mental derangement . . . ?" Answer—"No." The applicant signed a declaration at the foot of the questions that, with reference to the proposal for insurance and her former declaration, the answers to the foregoing questions were true. The doctor gave his answers to the questions put to him by the company, and his opinion, and sent them the documents so filled in, and a policy was issued. In 1906 the assured committed suicide. It appeared that in December, 1894, the applicant had consulted a Dr. M. for a severe attack of influenza followed by nervous depression that developed into acute mania, and that she was for about seven months in charge of a doctor at a private establishment, when she gradually recovered and was discharged. The applicant thought that she was only suffering from a nervous breakdown and was undergoing a rest cure, and she told Dr. T. this. Dr. S. was not called at the trial. In an action on the policy the jury found that the deceased did not know in 1902 that she had suffered from mental derangement; that she had foolishly, but not fraudulently, concealed the fact that she had consulted Dr. M. for nervous depression; and that the fact that she had consulted Dr. M. for nervous breakdown was material for the company to know. Judgment having been entered for the company:—

HELD—that the applicant's answers to the questions put to her by Dr. S. were not made the basis of the contract; and that with reference to the concealment of Dr. M.'s name, inasmuch as the doctor who saw the applicant and wrote down her answers was empowered to make any necessary explanation to her, and as he was not called at the trial to say what passed between them, it was impossible to say whether there was any concealment or not, and there must be a new trial.

Judgment of Lord Alverstone, C.J. ([1908] 2 K. B. 431; 24 T. L. R. 632; 52 Sol. Jo. 517) set aside.

JOEL v. LAW UNION AND CROWN INSURANCE CO., [1908] 2 K. B. 863; 77 L. J. K. B. 1108; 99 L. T. 712; 24 T. L. R. 898; 52 Sol. Jo. 740—C. A.

5. *Policy Void if Assured Commits Suicide—Saring of Bonâ fide Interest of Third Parties Based on Valuable Consideration—Suicide of Assured—Assignment of Policy—Non-communication of Assignment to Assignee.*—A policy of insurance for £5,000 on the life of H. contained the following clause:—"Policies will also be void . . . if the lives assured die by their own

hands . . . but without prejudice to the *bonâ fide* interest of third parties based on valuable consideration." H., who was indebted to W. to the amount of £15,000, and had given him some security therefor, instructed his solicitors to prepare an assignment of his life policy to W. to secure the debt. The assignment was accordingly prepared and executed by H., but it was never communicated to W., and shortly afterwards it was destroyed on H.'s express instructions. A few days later H. committed suicide. Subsequently in the administration of his estate, the facts in connection with the assignment became known for the first time to the executors of W. (who had died in the meantime), and they thereupon gave notice of it to the defendants, and claimed payment of the moneys assured by the policy.

HELD—that the action failed, as the plaintiffs could claim no interest under the deed of assignment based on valuable consideration.

WIGAN v. ENGLISH AND SCOTTISH LAW LIFE [ASSURANCE ASSOCIATION, [1909] 1 Ch. 291; 78 L. J. Ch. 120; 100 L. T. 34; 25 T. L. R. 81—Parker, J.

6. *Husband's Insurable Interest in Wife's Life—Joint Policy—Express Trust for Benefit of Husband—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11.*—A husband has, by presumption of law without need of proof, an insurable interest in his wife's life.

HELD ALSO, by Farwell, L.J., and Kennedy, L.J.—that a joint policy by husband and wife for the benefit of the survivor on the death of either is, when the husband survives, a valid insurance by the wife of her own life "expressed to be for the benefit of her husband" within sect. 11 of the Married Women's Property Act, 1882.

Decision of Pickford, J. (99 L. T. 29; 24 T. L. R. 700) affirmed on broader grounds.

GRIFFITHS v. FLEMING, [1909] 1 K. B. 805; [78 L. J. K. B. 567; 100 L. T. 765; 25 T. L. R. 377; 53 Sol. Jo. 340—C. A.

7. *Recovery of Premiums—Fraud of Insurance Agent—Statement Wholly Outside Agent's Authority—Liability of Company.*—Money received by an insurance company and paid to their agent by the assured upon a misrepresentation made by the agent, is money obtained by fraud, and can be recovered back from the company. It is no defence to such an action, whether brought for the return of the premiums paid on the faith of the misrepresentations or, *semble*, for a claim for damages, to allege that the misrepresentation was in respect of a matter wholly outside the agent's authority, and was therefore not binding on the company.

Decision of C. A. ([1908] 1 K. B. 545; 77 L. J. K. B. 421; 97 L. T. 896; 24 T. L. R. 217; 52 Sol. Jo. 158) affirmed without comment.

REFUGE ASSURANCE CO., LD. v. KETTLEWELL, [1909] A. C. 243; 78 L. J. K. B. 519; 100 L. T. 306; 25 T. L. R. 395; 53 Sol. Jo. 339—H. L.



## IV. Life—Continued.

8. *Proposal Form Recited in Policy—No Proposal Form Signed by Assured—Misrepresentation.*—The appellants, who were a registered industrial assurance company, were summoned for non-payment of the amount due on two life policies, each of which recited that the assured had signed and delivered a proposal which was the agreed basis of the contract, and that if any untrue averment was contained therein the policy would be void. The justices found in both cases that the proposal form had not been signed by the assured, and that the assured had no knowledge of its existence.

HELD—that in these circumstances the assurance company could not avoid the policy on the ground of an alleged misrepresentation in the proposal form.

PEARL LIFE ASSURANCE CO., LD. v. JOHNSON ;  
[SAME v. GREENHALGH, [1909] 2 K. B. 288 ;  
78 L. J. K. B. 777 ; 100 L. T. 483 ; 73 J. P.  
216—Div. Ct.]

## (b) "Carrying on Business."

[No paragraphs in this vol. of the Digest.]

## (c) Construction of Policy.

9. *Proposal and Declaration—Policy Indisputable after Two Years.*—The prospectus of a life insurance company contained a statement that after a policy had been continuously in force for two years without lapse it was indisputable in the absence of fraud, and no *bonâ fide* mistakes which had crept into the form of application would prejudice the validity of the policy. An applicant for a policy made two misstatements *bonâ fide* in the application form which was signed by her and the answers in which were made the basis of the contract. By a clause in the conditions in the policy "this policy, except as provided herein, will be indisputable from any cause (except fraud) after it shall have been continuously in force for two years." The assured died after the policy had been in force for more than two years.

HELD—that, there being no fraud, the policy was indisputable, and the sum insured was recoverable.

Decision of Bray, J. (99 L. T. 16 ; 24 T. L. R. 594) affirmed.

ANSTEY v. THE BRITISH NATURAL PREMIUM  
[LIFE ASSOCIATION, LD., 99 L. T. 765 ; 24  
T. L. R. 871—C. A.]

10. *Policy "with Participation in Profits"—Right of Policy-holder to Sue for Participation in Profits—Standard Life Assurance Company's Act, 1832 (2 Will. 4. c. lxxxi.), ss. 15, 51.*—Sect. 51 of the Standard Life Assurance Company's Act, 1832, empowers the directors "to lay aside and accumulate such part of the profits of the company as they shall judge proper and expedient, and to dispose of the same from time to time as may appear to them best for the advantage and security of the said company," and also to make such regulations as they shall think fit for the purpose of allowing persons who shall effect policies or transact other species

of business with the company to participate in the profits arising from the class of business in which they may be respectively concerned, and that to such extent and upon such terms and conditions as the ordinary directors may from time to time think proper for encouraging the business of the company. . . . The Standard Life Assurance Company issued two kinds of policies, one with and the other without participation in profits. The holder of a policy expressed to be with participation in profits paid a higher premium than the holder of a policy expressed to be without participation in profits.

HELD—that the holder of a policy expressed to be with participation in profits could only claim the benefit of any distribution of profits which the directors in the exercise of their discretion considered proper to make ; that whether there should be a distribution of profits or not was a matter entirely within the discretion of the directors ; and that, therefore, an action by the holder of a policy expressed to be with participation in profits was not maintainable to compel the company to set aside any part of its profits for the purpose of being distributed among the holders of such policies.

BAERLEIN v. DICKSON, 25 T. L. R. 585  
[Walton, J.]

## (d) Jurisdiction of Justices.

[No paragraphs in this vol. of the Digest.]

## (e) Practice.

[No paragraphs in this vol. of the Digest.]

## (f) Transfer, Mortgage, and Alteration of Rights.

See BANKRUPTCY, No. 16.

## (g) Miscellaneous.

11. *Life Assurance Company—Deposit—Amalgamation—Repayment of Deposit—Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 3.*—A deposit made by an insurance company in conformity with the Life Assurance Companies Act, 1870, s. 3, may be paid out to their assignees after dissolution of the depositing company, in the absence of any claim against that company, notwithstanding there has been no accumulation as in that section provided.

*Ex parte Scottish Economic Life Assurance Society* (45 Ch. D. 220 ; 60 L. J. Ch. 14 ; 62 L. T. 926) distinguished.

IN RE POPULAR LIFE ASSURANCE CO., [1909]  
[1 Ch. 80 ; 78 L. J. Ch. 37 ; 99 L. T. 909 ;  
25 T. L. R. 58 ; 63 Sol. Jo. 47—Warrington, J.]

12. *Surrender—Contract—Offer and Acceptance—Locus Pœnitentiæ.*—A., the holder of a policy of insurance which contained the following clause :—"At any time after five years' premiums have been paid, this policy may be surrendered for a cash payment," . . . wrote to the company as follows :—"I have decided that I will accept the surrender value of my full return policy, and shall be glad to have the money as soon as possible." In reply, the secretary of the company wrote asking A. to forward the policy, and stating that a cheque would be sent in a day



#### IV. Life—Continued.

or two. Before any formalities connected with the surrender had been executed, or the surrender value paid, A. claimed under the policy, maintaining that it was still in force.

**HELD**—that the clause in the policy was a standing offer by the company which the pursuer had accepted by his letter, thus constituting a concluded contract to surrender, and that the company were thereafter only liable for the surrender value.

**INGRAM-JOHNSON v. CENTURY INSURANCE CO.**  
[L.D., [1909] S. C. 732; 46 Sc. L. R. 746—  
Ct. of Sess.]

#### V. MARINE.

##### (a) Brokers' Rights and Liabilities.

[No paragraphs in this vol. of the Digest.]

##### (b) Collision.

[No paragraphs in this vol. of the Digest.]

##### (c) Concealment.

**13. Open Cover—Material Facts—Disclosure.**  
—Where an open cover is initiated under which the goods of various persons are subsequently declared, any material fact existing at the time when the goods are declared must be communicated to the underwriters, though that fact may not be in existence at the time when the cover is initiated.

**REPUBLIC OF BOLIVIA v. THE INDEMNITY**  
[**MUTUAL MARINE ASSURANCE CO., LD.**,  
99 L. T. 394; 24 T. L. R. 724; 11 Asp. M. C.  
117—Pickford, J.]

See S. C., *infra*.

##### (d) Construction.

[No paragraphs in this vol. of the Digest.]

##### (e) Damages and Contribution.

[No paragraphs in this vol. of the Digest.]

##### (f) Freight and Cargo.

[No paragraphs in this vol. of the Digest.]

##### (g) General Average.

**14. Spontaneous Combustion in Cargo of Coal—Damage Caused in Extinguishing Fire—Right of Cargo-Owner to Contribution from Ship—York-Antwerp Rules, r. 3—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502.**—A cargo-owner who has not been guilty of any wrong or negligence in the shipment of his cargo is not precluded from claiming contribution in general average from the ship, by reason of the fact that the peril giving rise to the claim has been occasioned by the inherent vice of the cargo itself, *e.g.*, by the spontaneous combustion of coal. Sect. 502 of the Merchant Shipping Act, 1894, which provides that "The owner of a British sea-going ship . . . shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity . . . where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of

fire on board the ship," does not exempt the shipowner from the liability to contribution in general average towards the loss sustained by a cargo-owner whose cargo has been damaged in the endeavour to extinguish a fire in a part of that cargo on board the ship.

Decision of C. A. ([1908] 1 K. B. 51; 77 L. J. K. B. 124; 98 L. T. 89; 52 Sol. Jo. 727; 13 Com. Cas. 91; 10 Asp. M. C. 597) affirmed.

**GREENSHIELDS, COWIE & CO. v. THOS. STEPHENS AND SONS**, [1908] A. C. 431; 77 L. J. K. B. 985; 99 L. T. 597; 24 T. L. R. 880; 14 Com. Cas. 41; 11 Asp. M. C. 167—H. L.

##### (h) Insurable Interest.

[No paragraphs in this vol. of the Digest.]

##### (i) Mortgages and Assignments.

[No paragraphs in this vol. of the Digest.]

##### (j) Practice.

[No paragraphs in this vol. of the Digest.]

##### (k) Risk: Nature, Duration, Change, etc.

[No paragraphs in this vol. of the Digest.]

##### (l) Seaworthiness.

[No paragraphs in this vol. of the Digest.]

##### (m) Subrogation.

**15. Sellers of Cargo not Paid at Time of Loss—Subsequent Payment by Buyers—Buyers Paid Amount of Insurance—Right of Sellers to Sue Ship—Right of Underwriters to Recover in Sellers' Name—Subrogation.**—Goods were sold by merchants abroad to merchants in England in pursuance of a c.i.f. contract, and the sellers sent the shipping documents to the buyers, reserving, however, the right over them until the buyers stated whether they elected to accept the enclosed bills or to pay cash less discount. The bills of lading were taken in the name of the sellers' agents. The goods were damaged on the voyage by a collision, and on the same day the buyers wrote to the sellers' agents enclosing a cheque in payment for the goods. The buyers brought an action against the owners of the other colliding ship to recover for the damage; the sellers were subsequently added as co-plaintiffs, on the ground that the property had never passed to the buyers, and the ship was held to blame. In the meantime the underwriters, with whom the sellers had effected a policy on the goods, paid the buyers as for a total loss. Upon the assessment of damages the Judge held that, as the sellers had not suffered any damage, they were not entitled to recover anything.

**HELD**—that the sellers were entitled to recover the amount of the loss on behalf of the underwriters.

**THE CHARLOTTE**, [1908] P. 206; 77 L. J. P. [132; 99 L. T. 380; 24 T. L. R. 416; 11 Asp. M. C. 87—C. A.]

##### (n) Time Policies and Valued Policies.

[No paragraphs in this vol. of the Digest.]

##### (o) Total Loss and Constructive Total Loss.

**16. Policy on Freight—Notice of Abandonment Freight Subsequently Earned.**—The plaintiffs

**V. Marine—Continued.**

took out a policy of insurance with the defendants on freight proposed to be earned by their ship on a voyage from Monte Video to New York. The ship left Monte Video on November 1st, 1905, but, becoming disabled by reason of heavy weather, she was towed into Charlestown on January 10th, 1906. After a survey had been held, notice of abandonment was given to the underwriters on January 20th, on the ground that there had been a constructive total loss of freight. They refused to accept the notice, but agreed that January 20th should be treated as the date on which a writ was issued. The vessel was subsequently sold, and after being repaired, was towed into New York, where the freight was collected by the purchasers.

**HELD**—that as there was a constructive total loss of freight at the date which was agreed as date of writ, the plaintiffs were entitled to recover the amount of the insurance, although the freight was in fact subsequently earned.

**BARQUE ROBERT S. BERNARD Co., LD. v. [MURTON]**, 101 L. T. 285; 53 Sol. Jo. 717; 14 Com. Cas. 267—Pickford, J.

**(p) Warranty.**

17. "*Contraband of War*"—*Warranty against Contraband Persons not Included.*—*Prima facie*, the term "contraband of war" applies to goods only and not to persons, and a warranty against "contraband of war" in a marine insurance policy on a neutral ship is not broken by the ship carrying officers belonging to one of the belligerent nations.

Decision of Bigham, J. ([1908] 1 K. B. 910; 77 L. J. K. B. 392; 24 T. L. R. 381; 52 Sol. Jo. 315) affirmed.

**YANGTZE INSURANCE ASSOCIATION v. INDEMNITY MUTUAL MARINE ASSURANCE Co.**, [1908] 2 K. B. 504; 77 L. J. K. B. 995; 99 L. T. 498; 24 T. L. R. 687; 52 Sol. Jo. 550; 13 Com. Cas. 283; 11 Asp. M. C. 138—C. A.

18. "*Warranted Free from Capture*"—*Loss of Ship after Capture by Perils of the Sea—Subsequent Condemnation by Prize Court—Relation Back.*—A policy of marine insurance contained a clause "warranted free from capture." The ship was, during the policy, captured by a Japanese cruiser at the time of the Russo-Japanese war, and while being taken to a Japanese port where a prize court was held she was lost by a peril of the sea. The ship was subsequently condemned by the prize court. In an action on the policy:—

**HELD**—that the owner lost his ship "by capture" and could not recover on the policy, and that it was unnecessary to decide whether in the case of a neutral vessel condemnation by a prize court relates back to the date of seizure, as it does in the case of a hostile vessel.

Decision of C. A. ([1908] 1 K. B. 601; 77 L. J. K. B. 569; 98 L. T. 146; 24 T. L. R. 208; 13 Com. Cas. 205; 10 Asp. M. C. 605) affirmed.

**ANDERSON v. MARTEN**, [1908] A. C. 334; 77 L. J. K. B. 950; 99 L. T. 254; 24 T. L. R.

775; 52 Sol. Jo. 680; 13 Com. Cas. 321; 11 Asp. M. C. 85)—H. L.

19. *Warranted Free from Capture, except Piracy—Organised Expedition to Establish Government.*—A policy of insurance on goods on a voyage from Para, at the mouth of the river Amazon, to Puerto Alonzo and places on the river Acre, which flowed into a tributary of the Amazon, contained a clause "warranted free of capture, seizure and detention... piracy excepted." The goods were provisions and stores which were shipped by the Bolivian Government for their troops who were in the district of El Acre for the purpose of resisting an organised expedition which was seeking to overthrow the Bolivian Government in that district and to establish a Government of their own. The organisers of the expedition thereupon fitted out two ships with arms for the purpose of intercepting the vessel carrying the provisions and stores, and they stopped the vessel in the river Acre and seized the goods. In an action on the policy:—

**HELD**—that this was not a loss by piracy within the meaning of the exception in the policy.

Decision of Pickford, J. (99 L. T. 394; 24 T. L. R. 724; 11 Asp. M. C. 117) affirmed.

**REPUBLIC OF BOLIVIA v. THE INDEMNITY [MUTUAL MARINE ASSURANCE Co., LD.]**, [1909] 1 K. B. 785; 78 L. J. K. B. 596; 100 L. T. 503; 25 T. L. R. 254; 53 Sol. Jo. 266; 14 Com. Cas. 156; 11 Asp. M. C. 218—C. A.

**INTEREST.**

See **BANKRUPTCY; COMPANIES; CONTRACTS; MONEY; PRACTICE AND PROCEDURE.**

**INTERNATIONAL LAW.**

See **ALIENS; CONFLICT OF LAWS.**

**INTERPLEADER.**

See **BANKRUPTCY; BILLS OF SALE; COURT; EXECUTION.**

**INTERPRETATION OF DOCUMENTS.**

See **DEEDS AND DOCUMENTS.**

**INTERPRETATION OF STATUTES.**

See **STATUTES.**

## INTERPRETATION OF WILLS.

See WILLS.

## INTERROGATORIES.

See DISCOVERY.

## INTESTACY.

See DESCENT AND DISTRIBUTION.

## INTOXICATING LIQUORS.

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### I. APPLICATIONS FOR NEW LICENCES.

[No paragraphs in this vol. of the Digest.]

### II. RENEWAL OF LICENCES.

#### (a) Jurisdiction and Procedure.

See also MAGISTRATES, No. 1.

1. *Offer of Surrender of Other Licences—Contribution to Compensation Fund—Licensing Act, 1904 (4 Edw. 7, c. 23).*—In deciding the question of the renewal of two or more licences belonging to different owners the compensation authority are entitled to take into consideration what, if any, licences the respective owners would be prepared to surrender, or what contri-

bution they would be prepared to make to the compensation fund.

R. v. SHANN AND OTHERS, EX PARTE WILSONS' [BREWERY, LD., 101 L. T. 545; 73 J. P. 515; 26 T. L. R. 25; 54 Sol. Jo. 66—Div. Ct.

#### (b) Compensation on Refusal.

2. *Compensation Awarded by Quarter Sessions—Action for Re-division of Compensation Money—Jurisdiction of High Court to Review the Award.*—A judge of the High Court has no jurisdiction to review an order of quarter sessions awarding compensation for non-renewal of a licence under the Licensing Act, 1904, and it is not, therefore, competent for any of the parties interested to maintain an action to bring about a re-division of the compensation fund.

The basis of valuation considered.

BENT'S BREWERY CO. v. DYKES, [1909] W. N. [51; 100 L. T. 476; 73 J. P. 227; 25 T. L. R. 347; 53 Sol. Jo. 302—Eve, J.

3. *Compensation Charge—Deduction from Rent by Mesne Tenant—"Unexpired Term"—Date of Calculation—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3, Sched. II.*—By sect. 3 (3) and Sched. II. of the Licensing Act, 1904, a licence holder who pays the compensation charge, and any person from whose rent a deduction is made in respect of the payment of the compensation charge, may deduct from his rent a percentage of the compensation charge which varies according to the length of the "unexpired term" of such licence holder or person. By sect. 3 (2) this charge is to be paid by the licence holder, together with and as part of the duties on his excise licence. The latter have to be paid on the 10th of October in each year.

HELD—that the period of the unexpired term of a lessee, who has sub-let the premises, is to be calculated from the 10th of October previous to the deduction being made from rent due from him to his lessor.

LONDON COUNTY COUNCIL v. WATNEY & [Co., [1909] 1 K. B. 637; 78 L. J. K. B. 421; 100 L. T. 336; 73 J. P. 202; 53 Sol. Jo. 303—Div. Ct.

4. *Payment of Compensation Money to Person Registered as Owner of Licence—Rights of Co-owners of Premises—Licensing Rules, 1904, r. 21—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 2.*—In an action commenced in the Court of Chancery of the County Palatine of Durham in 1900 the plaintiffs claimed that certain licensed premises of which the defendant was in possession should be sold and the proceeds divided among the persons entitled, including themselves, and that the defendant should account for the rents and profits received by him during a certain period; and in that action the defendant consented to a judgment for an inquiry as to the persons entitled, and for an account. By the Registrar's certificate made in pursuance of the judgment it appeared that the plaintiffs were entitled to a moiety of the premises; and by an order made in the action a sale of the



### 11. Renewal of Licences—Continued.

premises was directed and liberty to apply was given. The sale was, by consent, delayed, and in 1907 the compensation authority under the Licensing Act, 1904, refused the renewal of the licence, and compensation in respect thereof was afterwards fixed at £835 to the defendant as the person registered as owner of the premises in the register of licences kept in accordance with the Licensing Act, 1872. No written claim was sent by the plaintiffs to the compensation authority after the principal meeting of the compensation authority in July, 1907, in accordance with the provisions of rule 21 of the Licensing Rules, 1904, nor did they give notice of any claim to a share of the compensation money until the authority's supplemental meeting in May, 1908. At that meeting the compensation authority refused to hear the plaintiffs or entertain any claim by them, on the ground that they were too late and that rule 21 had not been complied with. In June, 1908, the compensation money was paid to the defendant. The plaintiffs then applied for an order that the compensation money in the defendant's hands should be paid in to the credit of the action in the Durham Palatine Court.

**HELD**—that the plaintiffs had an equity against the defendant entitling them to have the compensation money which had been paid to him brought into Court to the credit of the action.

**BIRKIN v. SMITH**, [1909] 2 K. B. 112; 71 L. J. [K. B. 739; 100 L. T. 835; 73 J. P. 306; 25 T. L. R. 499—C. A.]

**5. Company—Debenture Trust Deed—Compensation Money—Purchase Money—Capital Moneys—Investment—Licensing Act, 1904** (4 Edw. 7, c. 23).—Compensation money under the Licensing Act, 1904, received by the trustees of a debenture trust deed executed by a company owning licensed houses, may be treated as "purchase money" or "capital moneys" for the purpose of its application by them in accordance with the terms of the deed.

**Dawson v. Braine's Tadcaster Breweries, Ltd.** ([1907] 2 Ch. 359; 76 L. J. Ch. 588; 97 L. T. 83; 14 Manson, 254—Kekewich, J.) followed.

Under a general power to invest such purchase money in real or leasehold property, such trustees may apply it in either the purchase or (if the security is sufficient) the mortgage of licensed messuages and premises belonging either to the company or to third parties.

**IN RE BENTLEY'S YORKSHIRE BREWERIES, LD.** [1909] 2 Ch. 609; 78 L. J. Ch. 704; 101 L. T. 488; 53 Sol. Jo. 715—Warrington, J.]

**6. Compensation Charge—Deduction from Rent—Unexpired Term—Reversionary Lease—Licensing Act, 1904** (4 Edw. 7, c. 23), s. 3, sub-s. 3, and Sched. II.—The "unexpired term" mentioned in Sched. II. to the Licensing Act, 1904, according to the length of which is calculated the deduction that may be made from rent in respect of the compensation charge, does not include, besides the term of an existing tenancy, the term of a re-

versionary lease to commence on the day next but one after the expiration of the existing tenancy.

The words "unexpired term" are words of art to which their ordinary legal meaning ought to be given in the absence of qualifying context.

**Decision of Lawrence, J.** ([1909] 2 K. B. 884; 78 L. J. K. B. 825; 101 L. T. 348; 73 J. P. 418; 25 T. L. R. 723; 53 Sol. Jo. 699) reversed.

**LORD LANGATTOCK v. WATNEY, COMBE, REID & Co., LD.**, [1909] W. N. 250; 26 T. L. R. 125; 54 Sol. Jo. 116—C. A.]

**7. Compensation Charge—Deduction from Rent—Covenant by Tenant to Pay all Impositions and Outgoings—Lease Made After Act—Licensing Act, 1904** (4 Edw. 7, c. 23), s. 3 (3).—Sect. 3, sub-sect. 3, of the Licensing Act, 1904, provides that "such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence-holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge."

**HELD**—that the words "notwithstanding any agreement to the contrary" in the above subsection refer to any agreement made either before or after the passing of the Licensing Act, 1904.

**WOOLER v. NORTH-EASTERN BREWERIES**, [1909] W. N. 254; 26 T. L. R. 129—Div. Ct.]

**8. Compensation Levy—Tied Houses—Income Tax Deduction—Income Tax Act, 1842** (5 & 6 Vict. c. 35), s. 100, Sched. D.—**Licensing Act, 1904** (4 Edw. 7, c. 23), s. 3.—The compensation levy imposed by sect. 3 of the Licensing Act, 1904, upon a brewery company who are landlords of tied houses is an expense incurred for the purposes of their trade, which may be deducted from the profits of their trade in arriving at the assessable amount of such profits for the purposes of the Income Tax Acts.

**Decision of Channell, J.** ([1909] 1 K. B. 711; 78 L. J. K. B. 492; 100 L. T. 541; 73 J. P. 244; 25 T. L. R. 353) reversed (Kennedy, L. J., dissenting).

**SMITH v. LION BREWERY Co., LD.**, [1909] 2 K. B. 912; 78 L. J. K. B. 1089; 101 L. T. 145; 73 J. P. 447; 25 T. L. R. 748; 53 Sol. Jo. 696—C. A.]

### III. TRANSFERS AND REMOVALS.

*See also* LANDLORD AND TENANT, No. 14.

**9. Justices' Certificate—Irish Licensing Acts—Licence Not Obtained—Solicitor's Lien on Certificate—Recovery of Possession of Licensed Premises.**—Where a defendant is bound under an agreement to endorse and hand up the beer dealer's and spirit grocer's licences attaching to his premises upon the determination of his tenancy, he will be compelled to hand up the certificates obtained from the magistrates for the purpose of obtaining such licences as aforesaid where he has not proceeded upon such certificates to obtain the actual licences, and under such an agreement a mortgagee's title to

**III. Transfers and Removals—Continued.**

such certificates takes priority to a lien of the mortgagor's solicitor thereon.

**FINEGAN v. MCGARRELL**, 43 I. L. T. 184—C. A., [Ireland.]

**IV. OFFENCES.****(a) Refusing to Leave Licensed Premises.**

[No paragraphs in this vol. of the Digest.]

**(b) Sale by Unlicensed Person.**

[No paragraphs in this vol. of the Digest.]

**(c) Sale at Unlicensed Place.**

**10. Sale by Brewer's Drayman—Liability of Employer—No Appropriation by Employer—Aiding and Abetting Sale—Licensing Act, 1872** (35 & 36 Vict. c. 94), s. 3.]—The appellants were brewers, and by the system in use in connection with their business each of their draymen had a book called an "order and delivery book," which he took out each day, in which it was his duty to enter, when received, orders for beer, and hand in each evening to the appellants' clerk at their office. Each evening the drayman entered on a "load ticket" the orders for next day's delivery, which would be handed with the order and delivery book to the appellants' clerk. From these the loads for the next day's deliveries were made up, and it was the duty of a foreman and certain clerks to see that only a sufficient amount of beer was loaded to satisfy such day's orders. One of the appellants' draymen, on May 1, 1908, gave in his order and delivery book, which contained the names of three persons, W., L., and F., the order for each being one crate of bottled beer. On May 2 the drayman went out with a horse and van containing crates and bottled beer of the appellants. None of the goods bore the name of any customer for whom the goods were intended, and there was no appropriation or identifying marks upon any of the bottles or crates. The drayman delivered a crate to F., two bottles to one B., one bottle to L., and one bottle to W. There was no entry in the book of a single bottle as the order of W. and L. The quantities delivered were paid for on delivery, and the money was duly accounted for to the appellants at the end of the day. Draymen were warned not to deliver beer unless an order for same had first been taken to the licensed premises. The drayman having been convicted of selling beer without being duly licensed, the appellants were subsequently charged and convicted of aiding and abetting him in the commission of that offence, the justices having come to the conclusion that no sufficient appropriation of the bottles of beer had taken place before they left the licensed premises.

**HELD**—that the conviction was right.

*Cocher v. McMullen* (81 L. T. 784; 64 J. P. 245) followed.

**STANSFIELD & Co. v. ANDREWS**, 100 L. T. 529; [73 J. P. 167; 25 T. L. R. 259—Div. Ct.]

**(d) Selling or Keeping Open during Prohibited Hours.**

**11. Refreshment House in Wales—Hours of Closing—Day-time on Sunday—Sunday Closing**

(Wales) Act, 1881—*Licensing Act, 1874* (37 & 38 Vict. c. 49), s. 11.]—Sect. 11 of the Licensing Act, 1874, which prohibits the opening of refreshment houses between the hour of the night or morning when licensed houses are required to be closed and four o'clock in the morning, does not prevent an unlicensed refreshment house which is situate in Wales and in which no intoxicating liquors are sold being open between 5 and 6 p.m. on Sunday, as the restrictions imposed by that section do not apply to the day-time, and the Sunday Closing (Wales) Act, 1881, only applies to houses licensed under the Licensing Acts.

**PARKER v. HARRIS**, 100 L. T. 408; 73 J. P. 183 [—Div. Ct.]

**12. Six-day Licence—Christmas Day—Licensing Acts, 1872** (35 & 36 Vict. c. 94), s. 49, and 1874 (37 & 38 Vict. c. 49), s. 3.]—The holder of a six-days' licence is entitled, under sect. 3 of the Licensing Act, 1874, to keep open his premises on Christmas Day, but only during Sunday hours, provided Christmas Day is not also a Sunday.

**DAVIES v. HARRISON**, [1909] 2 K. B. 104; 78 [L. J. K. B. 626; 100 L. T. 899; 73 J. P. 268; 25 T. L. R. 449—Div. Ct.]

**(e) Miscellaneous Offences.**

See also GAMING AND WAGERING, Nos. 8, 9.

**13. Betting—Gaming—Licensing Act, 1872** (35 & 36 Vict. c. 94), s. 17 (1).]—Betting on horse races does not come within the meaning of the term "gaming" in sect. 17 (1) of the Licensing Act, 1872.

**KEEP v. STEVENS**, 100 L. T. 491; 73 J. P. 112 [—Div. Ct.]

**14. "Long Pull"—Sale in Marked Measure—Customer's Jug—Presence of Customer—Licensing Act, 1872** (35 & 36 Vict. c. 94), s. 8.]—The appellant, who was the holder of an off-licence for the sale of beer, was handed a jug by a customer and was asked for a pint of beer. In the presence of the customer he took a half-pint imperial measure, filled it twice and poured the beer into the jug and then pumped an additional quantity of beer into the jug. The appellant then handed the jug of beer to the customer, who paid for a pint of beer.

**HELD**—that the use of the half-pint instead of a pint measure did not constitute any offence, that as the beer was measured and transferred into the jug in the presence of the customer, the sale was a sale by imperial measure as required by sect. 8 of the Licensing Act, 1872, and that as the customer paid for a pint of beer the addition of extra beer beyond the measured pint was not an offence.

*Addy v. Blake* ((1887) 19 Q. B. D. 478; 56 L. T. 711; 51 J. P. 599; 35 W. R. 719; 16 Cox, C. C. 259) distinguished.

**PENNINGTON v. PINCOCK**, [1908] 2 K. B. 244; [77 L. J. K. B. 537; 98 L. T. 804; 72 J. P. 199; 24 T. L. R. 509; 52 Sol. Jo. 413; 6 L. G. R. 830; 21 Cox, C. C. 609—Div. Ct.]



## IV. Offences—Continued.

15. *Permitting Drunkenness—Lodger—Admission in a State of Intoxication—Licensing Act, 1872* (35 & 36 Vict. c. 94), s. 13—*Licensing Act, 1902* (2 Edw. 7. c. 28), s. 4.]—The appellant was a licensed hotel-keeper at C. A man entered the hotel at 10.30 p.m. on a Sunday in a state of intoxication, and his condition was observed by the appellant's manager, who accepted him as a lodger and allowed him to go to the smoking room, where two police officers found him in a state of intoxication at 11.30 p.m. In C. premises licensed for the sale of intoxicating liquors by retail are required by law to be closed during the whole of Sunday except as to *bonâ fide* travellers, persons lodging in the house, and private friends *bonâ fide* entertained by the licence-holder at his own expense.

The appellant was convicted of permitting drunkenness on his licensed premises contrary to sect. 13 of the Licensing Act, 1872.

HELD—that as the appellant was not bound to admit the man in a state of intoxication, the magistrate was entitled to find that the appellant had not discharged the onus of proof cast upon him by sect. 4 of the Licensing Act, 1902, and the conviction must be upheld.

THOMPSON v. MCKENZIE, [1908] 1 K. B. 905; 77 L. J. K. B. 605; 98 L. T. 896; 72 J. P. 150; 24 T. L. R. 330; 52 Sol. Jo. 302; 21 Cox. C. C. 620—Div. Ct.

16. *Permitting Drunkenness—Private Guests found Drunk after Closing Hours—Licensing Acts, 1872* (35 & 36 Vict. c. 94), s. 13, and 1902 (2 Edw. 7. c. 28), s. 4.]—The respondent, the proprietor of a licensed hotel, was charged with permitting drunkenness on the licensed premises. The respondent's wife entertained as private guests on the licensed premises a number of persons after closing hours, and two of these guests, M. and W., were drunk at the time the police visited the premises at 1 a.m. M., before becoming a private guest, had been on the premises as an ordinary customer, but was not then drunk. W. came on to the premises just before closing time and was then drunk.

HELD—that the respondent ought to have been convicted.

LAWSON v. EDMINSON, [1908] 2 K. B. 952; 78 [L. J. K. B. 36; 99 L. T. 797; 72 J. P. 479; 25 T. L. R. 11; 53 Sol. Jo. 15—Div. Ct.

17. *Knowingly Permitting Drunkenness on Licensed Premises—Reasonable Steps for Preventing—Licensing (Scotland) Act, 1903* (3 Edw. 7. c. 25), s. 98.]—A drunken man was assisted into the bar of a public-house by two friends who, themselves sober, were to be treated by him. The keeper of the public-house refused to supply the drunken man with alcoholic liquor, advising him to go home, but he did supply him with a bottle of non-alcoholic liquor, and supplied the two friends each with a glass of whisky on consideration of their undertaking to see the drunken man home. The three men consumed these liquors seated in the bar, and had been there about ten minutes when a constable looked in and drew attention to the drunken

man's condition. Three minutes later they left, the two friends assisting the drunken man. The keeper of the public-house was charged with knowingly permitting drunkenness on his premises.

HELD—that he had discharged the onus on him under the Licensing (Scotland) Act, 1903, s. 98, of proving that he "took all reasonable steps for preventing drunkenness on the premises."

SOUTAR v. AUCHINACHIE, [1909] S. C. (J.) 16; [46 Sc. L. R. 243—Ct. of Justs.]

## V. SALE TO CHILDREN.

18. *Corked and Sealed Vessel—Meaning of "Such as are Sold or Delivered"—Intoxicating Liquors (Sale to Children) Act, 1901* (1 Edw. 7. c. 27), s. 2.]—A publican commits no offence against sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, if, when a child under fourteen years of age is sent with a bottle to his public-house to fetch a pint of beer, his barman puts a pint of beer into the bottle and then corks and seals it before handing it back to the child. The words of the section, "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels," do not mean such intoxicating liquors as are commonly so sold or delivered, but such intoxicating liquors as are in fact so sold or delivered.

JONES v. SHERVINGTON, [1908] 2 K. B. 539; 77 [L. J. K. B. 771; 99 L. T. 57; 72 J. P. 381; 24 T. L. R. 693; 52 Sol. Jo. 582; 21 Cox. C. C. 642—Div. Ct.]

## VI. HABITUAL DRUNKARDS.

19. *"Habitual Drunkard"—Meaning of Term—Habitual Drunkards Act, 1879* (42 & 43 Vict. c. 19), s. 3.]—The definition of "habitual drunkard" in sect. 3 of the Habitual Drunkards Act, 1879, as "a person who, not being amenable to any jurisdiction in lunacy, is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor at times dangerous to himself or herself, or to others, or incapable of managing himself or herself, and his or her affairs," includes a person who by habitual drinking is habitually not in a fit condition to manage himself or his affairs, although in the intervals between his drinking bouts he may not be incapable of doing so, and is not confined to the case of a person who, as the result of drinking, is incapable of doing so even when sober.

EATON v. BEST, [1909] 1 K. B. 632; 78 L. J. K. B. [425; 100 L. T. 494; 73 J. P. 113; 25 T. L. R. 244—Div. Ct.]

20. *Disorderly Behaviour while Drunk—Three Previous Convictions Involving Drunkenness—No Power to Order Imprisonment in Addition to Detention in Inebriate Reformatory—Inebriates Act, 1898* (61 & 62 Vict. c. 60), s. 2 (1).]—When a prisoner is convicted upon indictment under sect. 2 (1) of the Inebriates Act, 1898, of an offence mentioned in Sched. I. thereto, and also of three previous convictions for similar offences, and of being an "habitual



**VI. Habitual Drunkards—Continued.**

drunkard," he cannot be sentenced to imprisonment in addition to detention in an inebriate reformatory.

R. v. BRIGGS, [1909] 1 K. B. 381; 78 L. J. K. B. [116; 100 L. T. 240; 73 J. P. 31; 25 T. L. R. 105; 53 Sol. Jo. 164—C. C. A.]

**VII. MISCELLANEOUS.**

21. *Excise—Licence—Sweets or Made Wine—Licence from Corporation of Oxford—Excise Licences Act, 1825 (6 Geo. 4, c. 81), s. 26—Customs and Inland Revenue Act, 1875 (38 Vict. c. 23), s. 9—Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 28—Oxford Corporation Act, 1890 (53 & 54 Vict. c. ccxxiii.), s. 119.*—The wine licence issued by the Corporation of the City of Oxford in exercise of the powers acquired by them from the University of Oxford under sect. 119 of the Oxford Corporation Act, 1890, includes the right to sell sweets or made wines.

ROBERTS v. TWINING, 101 L. T. 41; 73 J. P. [317; 25 T. L. R. 525—Div. Ct.]

**INVENTIONS.**

See PATENTS AND INVENTIONS.

**IRISH LAW.**

See also ARBITRATION, No. 6; JUDGMENT, No. 1.

1. *Landed Estates Court—Land Sold Subject to Jointure but Indemnified by Unsold Lands—Jointure Prior to Incumbrances—Rights of Jointure.*—In 1880 an Irish estate was put up for sale in 51 lots: 29 were sold, and the proceeds applied *pro tanto* in discharging incumbrances. There was a jointure charged upon the lands, but it was *paisne* to the other incumbrances. The purchasers of lots 1–29 bought subject to the jointure but were given an indemnity in respect of it against the unsold lots 47–51. In 1906 these lots were sold to the tenants under the Land Purchase Acts.

Held—that the jointure had priority over the incumbrances on these lots, and the purchasers of the indemnified lots had a similar priority in respect of their indemnity.

In re ROWE'S ESTATE ([1907] 1 I. R. 380—C.A.) and ROWE v. GOUGH ([1908] 1 I. R. 402—C.A.) reversed.

ROWE v. GOUGH; GOUGH v. BOLTON, [1909] [A. C. 64; [1909] 1 I. R. 98; 78 L. J. P. C. 65—H. L.]

**ISLE OF MAN.**

See DEPENDENCIES AND COLONIES.

**JAMAICA.**

See DEPENDENCIES AND COLONIES.

**JOINT STOCK COMPANIES.**

See COMPANIES AND COMPANY LAW.

**JOINT TENANCY AND TENANCY IN COMMON.**

See LANDLORD AND TENANT, No. 1; PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

**JOINTURE.**

See HUSBAND AND WIFE; REAL AND PERSONAL PROPERTY; RENT-CHARGES, No. 1; SETTLEMENTS.

**JUDGES.**

[No paragraphs in this vol. of the Digest.]

**JUDGMENT.**

See also ESTOPPEL; MISREPRESENTATION AND FRAUD, No. 1; PRACTICE, No. 28.

1. *English Judgment Extended to Ireland—Registration of as Judgment Mortgage*—"So far only as Relates to Execution"—*Costs of Extending Judgment—Their Inclusion in Affidavit of Registration not Necessary—Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 4—Judgment Mortgage (Ireland) Act, 1850 (13 & 14 Vict. c. 29), s. 6.*—An English judgment extended to Ireland under the provisions of the Judgments Extension Act, 1868, is capable of registration as a judgment mortgage against an interest of the debtor in lands in Ireland. "Execution" in sect. 4 of the Judgments Extension Act means any legal process by which a creditor can enforce payment of what is due under the judgment. The costs of extending the judgment to Ireland, not being costs recovered by the judgment, need not be included in the affidavit made in pursuance of the Judgment Mortgage Act.

IN RE CLELAND'S ESTATE, [1909] 1 I. R. 1; 43 [I. L. T. 26—C. A., Ireland.]

**JUDGMENT SUMMONS.**

See COUNTY COURTS.

**JUDICIAL COMMITTEE.**

See COURTS.

**JUDICIAL SEPARATION.**

*See* HUSBAND AND WIFE.

**JURIES.**

*See also* CRIMINAL LAW AND PROCEDURE, Nos. 26, 27, 28, 118 ; MAGISTRATES, No. 11 ; PRACTICE, Nos. 11, 12.

1. *Jury Equally Divided Immediately Before Verdict—Stay of Execution.*—A jury returned a verdict against a defendant. On the following day a stay of execution, applied for on the ground that it had since transpired that the jury were equally divided in opinion immediately before their verdict was given, was granted on terms.

BURBERRY'S *v.* MAYER AND ANOTHER, *Times*, [January 21st, 1909—Darling, J.

**JURISDICTION.**

*See* ACTION : CONFLICT OF LAWS ; COUNTY COURTS : COURTS ; MAGISTRATES, ETC.

**JUS TERTII.**

*See* PRACTICE AND PROCEDURE.

**JUSTICE OF THE PEACE.**

*See* MAGISTRATES.

**JUVENILE OFFENDER.**

*See* CRIMINAL LAW AND PROCEDURE.

**KIDNAPPING.**

*See* CRIMINAL LAW AND PROCEDURE.

**LACHES.**

*See* EQUITY ; LIMITATION OF ACTIONS ; WAIVER.

**LANCASTER PALATINE COURT.**

*See* COURTS.

**LAND.**

*See* REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND, ETC.

**LAND AGENTS.**

*See* AGENCY : SALE OF LAND : VALUERS AND APPRAISERS.

**LAND CHARGES.**

*See* REAL PROPERTY AND CHATTELS REAL ; SALE OF LAND.

**LAND CLAUSES CONSOLIDATION ACTS.**

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**LAND DRAINAGE ACTS.**

*See* SEWERS AND DRAINS.

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**LAND TAX.**

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**LAND TRANSFER.**

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**LANDLORD AND TENANT.**

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5, 6.

## I. RELATION OF LANDLORD AND TENANT.

See also No. 7, *infra*; DISTRESS, No. 4.

1. *Privity of Estate—Joint Tenancy—Tenancy in Common—Death of One Joint Tenant—Action for Rent against Executors.*—By deed of assignment dated March 30th, 1895, T. N. "assigned to S. and C., therein called the purchasers, their and each of their executors, administrators, and assigns," his lease of certain premises, and "the purchasers and each of them for himself and each of them for his heirs, executors, and administrators covenanted with the vendor that they the purchasers and each of them and each of their executors and administrators would thenceforth pay the rent and perform the covenants and indemnify the vendor, &c." S. and C. thereupon entered into possession of the premises and carried on business therein as partners at will. In 1900 the partnership was dissolved and by a memorandum of agreement C. "relinquished all his interest in the partnership assets and thereby assigned to S. all his interest in the sub-lease of the premises and other partnership assets, together with the goodwill of the business, and S. thereby undertook to pay, satisfy, and discharge the liabilities of the business and to indemnify C. therefrom as from that date. C. thereby undertook to execute a formal assignment to give effect thereto." No formal assignment was ever executed. S. died on February 21st, 1908, leaving the defendants his executors. C. was still alive. In an action by the plaintiffs as assignees of the reversion against the defendants for rent:—

**HELD**—(1) that the effect of the assignment of 1895 was to create a joint tenancy and not a tenancy in common; (2) that therefore on the death of S. the legal estate became vested in C. alone and never passed to the defendants as S.'s executors; and (3) that there was no privity of estate between the plaintiffs and the defendants and consequently that the action failed.

**GODDARD AND ANOTHER v. LEWIS AND**  
[ANOTHER, 101 L. T. 528; 25 T. L. R. 813—  
Jelf, J.]

2. *Trustee—Disclaiming of Lease of Plot of Land—Bankrupt having Mortgaged by Demise*



## I. Relation of Landlord and Tenant Continued.

*Portions of Plot Order Vesting in Mortgagees—Whole Plot Including Portion Not Mortgaged—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, sub-s. 6.*—The lessee of a plot of land mortgaged by sub-demise four portions of the plot to four different mortgagees, retaining the remainder of it. He subsequently became bankrupt, and his trustee in bankruptcy disclaimed the lease. A trustee for the four mortgagees (himself a solvent person) applied to a county court judge for an order vesting in him as such trustee all the rights, interest and title of the bankrupt under the lease, including the portion of the plot not mortgaged, subject to the rent, covenants and conditions contained in the lease. The county court judge made the order.

HELD—that the order was properly made.

IN RE HOLMES, EX PARTE ASHWORTH, [1908]  
[2 K. B. 812; 52 Sol. Jo. 728; 15 Manson, 331—Div. Ct.]

## II. AGREEMENTS FOR LEASES.

[No paragraphs in this vol. of the Digest.]

## III. ESSENTIALS OF LEASE.

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## IV. PARCELS OR PREMISES INCLUDED IN THE DEMISE.

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### (a) Easements.

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### (b) Fixtures.

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### (c) Sporting Rights.

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## V. DURATION OF TENANCY.

### (a) Notice to Terminate.

3. *Lease to Two Persons—Proviso Enabling Lessees to Determine Lease by Notice—Notice by One Only—Effect of.*—A lease to two lessees (husband and wife) contained a proviso that if "the lessees" wished to determine the lease at a certain date, they might give notice of their intention.

The husband gave a notice.

HELD—that the lease required notice by both, and that the mere fact that the rent had been paid by the husband was not sufficient to prove that he was his wife's agent for the purpose of giving notice.

IN RE VIOLA'S LEASE, HUMPHREY v. STENBURY,  
[1909] 1 Ch. 244; 78 L. J. Ch. 128; 100 L. T. 33—Warrington, J.]

### (b) Renewal.

4. *Exchange of Old Lease Granted by Corporation for New Lease—New Lease Void or Voidable as being Without Approval of Local Government Board—Whether Old Lease Surrendered—Whether Corporation Estopped from Denying the*

Y.D.

*Surrender—Real Property Limitation Acts—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 108—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72.*—In 1892 the defendant occupied certain premises under a lease granted in 1599 for the term of 300 years, which would expire in ordinary course in 1899. The lease was granted at a rent of 8d. per annum, but for more than 100 years the tenant had paid no rent. An action was brought against the defendant for rent, but a compromise was arrived at by which the defendant agreed to surrender the lease for 300 years if she were given a new lease for her life free of rent. Accordingly she handed the old lease to the plaintiffs and received from them in 1892 what purported to be a lease of the premises to her, free of rent, but containing a covenant to repair. The lease of 1892 was not approved of by the Local Government Board, and was, therefore, admittedly either void or voidable by reason of sect. 108 of the Municipal Corporations Act, 1882, as amended by sect. 72 of the Local Government Act, 1888. In an action to recover possession of the premises the defendant contended that the lease of 1892 was void, that the long lease had been surrendered in 1892, that the Statute of Limitations began to run in 1892, and that, therefore, she was entitled to the freehold.

HELD—that whether the lease of 1892 was void or voidable, there was only a conditional surrender of the long lease in 1892, and that, therefore, the plaintiffs' title did not accrue till 1899, and they were entitled to recover possession of the premises.

HELD ALSO—that the plaintiffs were not estopped from setting up the invalidity of the lease of 1892, or from denying the efficacy of the surrender of the lease of 1599.

Decision of Div. Ct. (99 L. T. 612; 72 J. P. 465; 6 L. G. R. 916) affirmed.

CANTERBURY CORPORATION v. COOPER, 100  
[L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301;  
7 L. G. R. 908—C. A.]

### (c) Tenancy at Will.

[No paragraphs in this vol. of the Digest.]

### (d) Tenancy from Year to Year.

[No paragraphs in this vol. of the Digest.]

### (e) Weekly Tenancy.

[No paragraphs in this vol. of the Digest.]

### (f) Life Tenancy.

[No paragraphs in this vol. of the Digest.]

## VI. RENT.

5. *Option to Purchase—Rent "Duly" Paid—Condition Precedent—Specific Performance.*

A tenant under a three years agreement had an option to purchase the leasehold reversion on giving notice, provided that the rent had been duly paid. The tenant paid a quarter's rent sixteen days after it was due, and before the next payment was due gave notice of the exercise of the option of purchase.

HELD—that "duly" does not mean punctually, and that the tenant had duly paid the rent within

# VI. Rent—Continued.

the meaning of the agreement, and was entitled to specific performance thereof.

STARKEY v. BARTON, [1909] 1 Ch. 284; 78 [L. J. Ch. 129; 100 L. T. 42—Parker, J.]

**6. Rent Due on Sunday—Distress on Monday.**—Rent may lawfully be made payable on a Sunday, and in such a case, if it is not paid on that day, a distress may be levied on the following day.

CHILD v. EDWARDS, [1909] 2 K. B. 753; 78 [L. J. K. B. 1061; 101 L. T. 422; 25 T. L. R. 706—Ridley, J.]

**7. "Landlord"—Receiver—Execution—Landlord and Tenant Act, 1709** (8 Anne, c. 18 (c. 14 in *Ruffhead*)), s. 1.]—A brewery company granted an underlease of a public-house in 1896, and on the same day the underlessee mortgaged his leasehold interest to the plaintiff, and gave a second mortgage to the company. In 1901 the underlessee became bankrupt, and the defendant was appointed his trustee in bankruptcy. In 1902 the company as second mortgagees went into possession, and thereafter let the public-house, with the fixtures, from year to year at the yearly rent of £150 for the premises, and the additional yearly sum of £1,250 in lieu of premium for the goodwill of the business and for the use of the fixtures and fittings. In 1907 the company obtained judgment against the tenant for £964, and in February, 1909, the tenancy was determined at a month's notice. On March 9th, 1909, foreclosure proceedings were commenced by the plaintiff, and on March 12th a receiver and manager was appointed, and the company was directed to give up possession of the premises so far as was necessary for the purposes of the receivership. On the same day the sheriff levied execution in respect of the judgment obtained by the company in 1907 against their tenant, and on April 8th the sheriff sold the goods seized to the receiver for £700.

**HELD**—that at the date of the execution the receiver was the "landlord" of the premises within sect. 1 of the Landlord and Tenant Act, 1709, so as to be entitled to be paid the arrears of rent due at the time of the execution, and that looking at the substance of the transaction, the rent was £150 a year, and that for this purpose the £1,250 could not be taken into account.

COX v. HARPER, [1909] W. N. 244; 101 L. T. [669; 26 T. L. R. 105—Joyce, J.]

# VII. RESTRICTIVE COVENANTS.

**8. House Not to be Used for Trade or Business—Gable Ends Let as Bill-posting Stations.**—A lease contained a covenant that the lessee, his executors, administrators and assigns, would not use, exercise, or carry on, or permit to be used, exercised, or carried on, upon the demised premises, or any part thereof, any trade or business whatsoever, but would keep the demised house as and for a private dwelling-house. The lessee let the gable ends of the house to a bill-posting firm as a bill-posting station, and the bill-posters displayed large advertisements thereon.

**HELD**—that the lessee had thereby committed a breach of covenant.

The owner of ground-rents is not bound from time to time to go to the property to see whether the lessee's covenants are being observed.

TUBBS v. ESSER, 26 T. L. R. 145—Parker, J.]

# VIII. RATES, TAXES AND OUTGOINGS.

See also RATES AND RATING, Nos. 6, 7.

## (a) Charges borne by Lessor.

**9. Covenant by Lessor to Pay Rates**—"Now Payable or hereafter to become Payable"—*Premises Sub-let at a Profit—Increased Assessment—Liability of Lessor.*—In 1899, four floors of a building were let on lease, the lessor covenanting to pay all rates, &c., "now payable or hereafter to become payable" in respect of the premises except inhabited house duty. At that date the whole building was assessed to rates in one sum. The lessee sub-let, at a profit, the four floors to different tenants. At the quinquennial valuation in 1905, each floor was assessed separately, and in consequence of the profit rentals, the total assessment for the whole building was considerably increased. The trustees of the lessor's will now contended that they were not liable for the increase in rates attributable to the profit rentals paid to the lessee.

**HELD**—that the covenant in the lease extended to the increased rates payable in respect of the premises, and that the landlord was liable for them.

Watson v. Home ((1827) 7 B. & C. 285), Smith v. Humble (1854) 15 C. B. 321, and Mansfield v. Relf ([1908] 1 K. B. 71—C. A.) distinguished.

Decision of Neville, J. ([1909] 2 Ch. 64; 78 L. J. Ch. 536; 100 L. T. 729), affirmed.

SALAMAN v. HOLFORD, [1909] 2 Ch. 602; 101 [L. T. 505—C. A.]

**10. Water Rate—Domestic and Trade Purposes—Lock-up Shop.**—A covenant by a landlord with the lessee of a lock-up shop to pay all rates and taxes, except gas and electric light, will include the water rate for water supplied for domestic purposes, but not the rate for water supplied for trade purposes.

DRIESELMAN v. WINSTANLEY, 53 Sol. Jo. 631— [Eve, J.]

## (b) Factories and Workshops.

[No paragraphs in this vol. of the Digest.]

## (c) Paving Expenses.

[No paragraphs in this vol. of the Digest.]

## (d) Requirements of Sanitary Authority.

[No paragraphs in this vol. of the Digest.]

# IX. REPAIRS, MAINTENANCE, AND IMPROVEMENT.

## (a) Alteration.

[No paragraphs in this vol. of the Digest.]

## (b) Building Covenants.

See SALE OF LAND, Nos. 14, 15.

## IX. Repairs, Maintenance, and Improvement— *Continued.*

### (c) Insurance Covenants.

[No paragraphs in this vol. of the Digest.]

### (d) Liability of Landlord for Non-repair.

[No paragraphs in this vol. of the Digest.]

### (e) Repairing Covenants.

[No paragraphs in this vol. of the Digest.]

## X. COVENANTS BY LESSOR.

### (a) Restrictive Covenants.

*See* SALE OF LAND, No. 14.

### (b) Quiet Enjoyment.

11. *Express Covenant Excluding Implied Covenant upon a Collateral Matter—Benefit of Contract of Suretyship—Discharge of Sureties Not Disclosed by Lessor.*—In the year 1903 the plaintiff granted a lease of certain lands to the defendants, subject as to part of said lands, to a weekly tenancy therein created by the plaintiff, together with "all the right, benefit and advantage" of the lessor under a memorandum of agreement, dated September 5th, 1895. According to this memorandum the payment of the weekly rent had been guaranteed by two sureties, but on December 3rd, 1898, the sureties had been discharged by the plaintiff. An express covenant for quiet enjoyment in the lease made no reference to the said contract of suretyship. In answer to a claim by the plaintiff for rent under the lease of 1903 the defendants counterclaimed for damages for breach of contract to assign to them the full right and benefit of the contract of suretyship and for non-disclosure of the discharge of the sureties. They did not allege at the hearing any fraudulent misrepresentation or concealment.

HELD—that the express covenant for quiet enjoyment in the lease excluded any implied covenant in respect of the contract of suretyship.

MURPHY v. BANDON CO-OPERATIVE AGRICULTURAL DAIRY SOCIETY, LD., 43 I. L. T. 252  
—C. A., Ireland.

## XI. DEROGATION FROM GRANT.

[No paragraphs in this vol. of the Digest.]

## XII. FORFEITURE.

### (a) Notice of Breach of Covenant.

[No paragraphs in this vol. of the Digest.]

### (b) Re-entry.

12. *Proviso for Re-entry upon Breach of Covenant—Severance of Reversion by Act of Law—Effect on Proviso.*—A proviso for re-entry upon breach of any condition is not destroyed by a severance of the reversion if such severance is not due to the voluntary act of the lessor, e.g., if part of the premises are taken compulsorily by a public body.

*Winter's Case* (1572) 3 Dyer, 308 (b) followed.

PIGGOTT v. MIDDLESEX COUNTY COUNCIL, [1909] 1 Ch. 134; 77 L. J. Ch. 813; 99 L. T. 662; 72 J. P. 461; 52 Sol. Jo. 698; 6 L. & R. 1177—Eve, J.

### (c) Relief against Forfeiture.

13. *Writ Claiming Possession—Election by Landlord—Underlease—Relief Granted to Lessee—Determination of Lease—Effect on Underlease—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, s. 14).*—The effect of the order giving relief against forfeiture for a breach of covenant to repair is to continue the original lease for all purposes, so that an under-lessee continues liable on the covenants in his derivative lease notwithstanding the issue of the writ to recover possession by the superior landlord.

Decision of Darling, J. ([1909] 2 K. B. 895) affirmed.

DENDY v. EVANS, [1909] W. N. 258; 54 Sol. Jo. 151—C. A.

## XIII. DWELLING-HOUSES AND FLATS.

[No paragraphs in this vol. of the Digest.]

## XIV. LICENSED PREMISES.

*See also* INTOXICATING LIQUORS, Nos. 3, 6.

### (a) Covenants against Forfeiture of Licence.

14. *Covenant by Lessee to Transfer Licence at Termination of Lease—Misconduct of Sub-tenant—Forfeiture of Licence—Renewal Refused.*—In 1899 the plaintiffs let a beerhouse to the defendant for a term of ten years. By the lease the defendant covenanted "to keep and conduct the said beerhouse in a regular and proper manner in every respect, and when necessary to apply for and use her best endeavours to obtain a licence . . . for the sale of beer, &c., and a renewal of the same from time to time, and not knowingly or willingly to do any act whereby the same may become legally or justly abrogated, forfeited, or the renewal thereof refused; and on the determination of the said term to transfer the same licence to the lessors, or as they shall direct." The renewal of the licence was refused by the justices in 1901 on the ground that the house had been improperly conducted by the defendant's sub-tenant. An appeal against this refusal was dismissed, and at the next sessions the defendant's application for a new licence was refused. The plaintiffs now sued the defendant for failure so to transfer the licence to them at the expiration of the term.

HELD—that the covenant imposed an obligation upon the defendant to do her best to keep the licence alive, and that if she kept it alive she was bound to transfer it at the end of the term, but that, as she had done all she could to keep the licence alive, she had not committed a breach of the covenant.

WILLIAMSON AND OTHERS v. ISSOTT, 25 T. L. R. 514—Walton, J.

### (b) Maintenance of Business and Licence.

15. *Lease of Beerhouse—Licence Extinguished during Currency of Lease—Liability of Tenant for Subsequent Rent.*—During the continuance of the lease of an ante-1869 beerhouse "and premises, with the bakehouse in the rear," by which the landlord covenanted for quiet enjoyment, and the tenant covenanted not to use the



XIV. Licensed Premises *Continued.*

premises otherwise than as a beerhouse except with the consent of the landlord, the renewal of the licence of the house was refused by the compensation authority, subject to compensation. Both landlord and tenant received compensation. In an action for rent accruing due subsequent to the extinction of the licence, the tenant contended that the lease had determined on the extinction of the licence as on a total failure of consideration.

HELD—that the lease had not so determined.

GRIMSDICK *v.* SWEETMAN, [1909] 2 K. B. 740; [78 L. J. K. B. 1162; 101 L. T. 278; 73 J. P. 450; 25 T. L. R. 750; 53 Sol. Jo. 717—Div. Ct.

## (c) Tied Houses.

[No paragraphs in this vol. of the Digest.]

## XV. COVENANTS AGAINST ASSIGNING OR UNDERLETTING.

[No paragraphs in this vol. of the Digest.]

## XVI. EFFECT OF ASSIGNMENT ON COVENANTS.

## (a) Assignment of Lease.

16. *Covenant Running with the Land—Lease and Underlease—Covenant by Underlessor to Perform Covenants in Lease—Covenant to Repair—Underlessor's Assigns—Covenant Running with Reversion.*—A lease of land contained a covenant by the lessee to keep all buildings erected on the land in repair, with a proviso for re-entry on breach of the covenant. Part of the land comprised in the lease was underlet, the underlease containing a covenant by the underlessor, his executors, administrators, and assigns, to perform the several covenants and conditions contained in the indenture of lease so far as the same related to or affected that part of the property included in the lease but not demised by the underlease. The underlease also contained a proviso that the covenants on the part of the underlessor were entered into with the intention of binding him and his representatives only while he or they continued to hold the reversion, and of binding, so far as could be, any other person or persons for the time being entitled to the reversion. Subsequently the lease became vested in the defendant, and the plaintiff became assignee of the underlease. The defendant failed to perform the covenant in the lease to repair certain houses erected on that part of the land not comprised in the underlease, and the assignee of the reversion expectant on the lease recovered judgment for possession of the whole of the property comprised in the lease, and the plaintiff was ejected. In an action to recover damages for breach of the covenant in the underlease:—

HELD—that the covenant in the underlease relating to premises not demised thereby was merely collateral, and did not run with the land so as to bind the assigns (though named) of the underlessor, and that therefore the plaintiff could not recover.

*Doughty v. Bowman* ((1848) 11 Q. B. 444) discussed.

*Sampson v. Easterby* ((1829) 9 B. & C. 505; (1830) 6 Bing. 644) distinguished.

Decision of C. A. ([1908] 1 K. B. 94; 77 L. J. K. B. 169; 97 L. T. 885; 24 T. L. R. 62) affirmed.

DEWAR *v.* GOODMAN. [1909] A. C. 72; 78 [L. J. K. B. 209; 100 L. T. 2; 25 T. L. R. 137; 53 Sol. Jo. 116—H. L.]

17. *Covenant Running with the Land—Restrictive Building Covenant—Adjoining Land—“Assigns”—Damages.*—The defendants who owned building land leased a plot with a house erected upon it to B., and covenanted for themselves and their assigns not to erect or permit to be erected on the adjoining land belonging to them any building beyond a defined building line. B. assigned his lease to the plaintiff. Subsequently the defendants entered into a building agreement with T. whereby on the erection on the adjoining land of a house to be approved by the defendants T. was to be granted a lease. T. failed to observe the building line required in throwing out a bay window beyond it. The plaintiff complained at once to the defendants, who then warned T. to observe the building line. T. took no notice and completed his house.

HELD—that the covenant by the defendants ran with the land, that T. was their assign, and that the plaintiff was entitled to damages.

RICKETTS *v.* ENFIELD CHURCHWARDENS, [1909] 1 Ch. 544; 78 L. J. Ch. 294; 100 L. T. 362—Neville, J.

18. *Covenant Running with the Land—Repair of Sea Wall—Liability of Assignee to Contribute.*—In a lease of certain lands situate near the sea there was a covenant that if it became necessary to rebuild or repair a certain sea wall, the lessee, his executors, administrators, or assigns would contribute and pay a proportionate part of the cost and expenses incurred in such rebuilding or repairing. The sea wall in question did not form any part of the demised premises, but lay between them and the sea, and was necessary in order to protect the demised premises from encroachment by the sea and consequent destruction.

HELD—that this was a covenant running with the land and bound the assignee.

LYLE *v.* SMITH, 43 I. L. T. 255—C. A., Ireland.

## (b) Assignment of Reversion.

19. *Severance of Reversion—“Act of Law”—Compulsory Purchase by Public Authority—Freehold of Portion of Land—Lease of Remainder—Breach of Covenants—Proviso for Re-entry—Apportionment of Condition—Demolition of whole Premises—Action for Compensation—Notices of Breach—Sufficiency—County of Middlesex Light Railways Order, 1903—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68—Conveyancing and Law of Property Act, 1881, ss. 10, 12, 14.*—A county council, in the exercise of statutory powers, compulsorily acquired from a freeholder one-third of a piece of his land upon which two cottages were stand-

XVI. Effect of Assignment on Covenants—Continued.

ing, being a strip thereof fronting a public road. The freeholder elected to retain the remaining two-thirds of his property. The council also acquired the leasehold interest, which was held under a lease of 1867, in the whole of the property. They pulled down the whole of the cottages, not only that part of them situate on the strip, and let the remainder of the property to a stonemason, who used it for his trade.

Upon action by the freeholder, the lessor, to enforce his right of re-entry and for damages for breach of covenants in the lease to repair and keep the gardens of the cottages in cultivation :—

HELD—(1) that the severance of the reversion being an involuntary act on the part of the lessor did not destroy the condition of re-entry (*Winter's Case* (1572), 3 Dyer, 308 (b) followed) ;

(2) That the remedy by compensation under sect. 68 of the Lands Clauses Consolidation Act, 1845, was not applicable, as the damage was not the result of the proper exercise of statutory powers ;

(3) That it is not necessary in giving notice as to breaches of covenant under sect. 14 of the Conveyancing Act, 1881, after stating the particular breach, and requiring the recipient to remedy it, to state also what he is required to do in order to remedy it ;

(4) That the covenant to repair was applicable to a part of the property.

HELD, therefore,—that there must be an order for possession, mesne profits, and damages.

PIGGOTT v. MIDDLESEX COUNTY COUNCIL.  
[1909] 1 Ch. 134 ; 77 L. J. Ch. 813 ; 99 L. T. 662 ; 72 J. P. 461 ; 52 Sol. Jo. 698 ; 6 L. G. R. 1177—Eve, J.

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See CRIMINAL LAW AND PROCEDURE.

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LIBEL AND SLANDER.

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See also DISCOVERY, No. 4 ; PRACTICE ; TRADE AND TRADE UNIONS, Nos. 10, 11.

I. LIBEL.

- (a) Fair Comment on Matters of Public Interest.

1. *Comment on Untrue Statements in Privileged Document—Publication Partly Statement and Partly Comment—Statement or Comment—Question for Jury.*—Comment by one person upon statements made in a privileged document by another which are defamatory and untrue is fair provided that the comment would be fair if the statements made were true.

*Reis v. Perry* ((1895) 61 L. J. Q. B. 566 ; 43 W. R. 648 ; 59 J. P. 308 ; 11 T. L. R. 373) commented upon.

When in a published document the writer partly alleges and partly comments, and the sum total is defamatory, the document cannot be justified unless the facts are true and the comment fair. But when one person alleges and another comments, this does not apply.

### I. Libel—Continued.

A letter, together with an abstract from a Blue Book, was published in a newspaper. Statements in the extract as to the career of M. were capable of being construed as defamatory. In the letter the writer said of M., his "interesting career is detailed in the enclosed abstract, for which I trust you will find room in your columns."

**HELD**—that it was open to a jury to find that these words in the letter were words of comment and not of statement.

*MANGENA v. WRIGHT*, [1909] 2 K. B. 958; 78 [L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485—Phillimore, J.

### (b) Miscellaneous.

**2. Question for Jury—Whether Language Defamatory—Whether Understood to Refer to Plaintiff by Persons Knowing Him—Proof of Writer's Intention to Refer to Plaintiff not Necessary.**—In an action for libel, the question, if it be disputed, whether the alleged defamatory statement is a libel on the plaintiff is one of fact for the jury. That question of fact involves not only whether the language used is, when taken in its fair and ordinary meaning, defamatory, but also whether it would be understood to refer to the plaintiff by persons who knew him; and if in the opinion of the jury the language used is defamatory and a substantial number of persons who knew the plaintiff would read the alleged libel as referring to him, damages are recoverable, even although the writer or publisher may neither have known of the plaintiff's existence nor have intended to refer to him or any other particular individual.

Decision of C. A. ([1909] 2 K. B. 444; 78 L. J. K. B. 937; 101 L. T. 330; 25 T. L. R. 597) affirmed.

*E. HULTON & Co. v. JONES*, [1909] W. N. 249; [26 T. L. R. 128; 54 Sol. Jo. 116—H. L.

**3. Defamation by Actions—Innuendo—Investigation of Agent's Accounts.**—There may be an actionable wrong of the nature of defamation by actions alone; but the question must always be whether the innuendo sought to be put upon such actions can in truth reasonably be drawn from them.

A person is entitled to investigate his agent's accounts without thereby charging him with dishonesty.

*DRYSDALE v. EARL OF ROSEBERY*, [1909] S. C. [1121; 46 Sc. L. R. 795—Ct. of Sess.

### (c) Practice.

See also PRACTICE, No. 25.

**4. Evidence in Mitigation of Damages—R. S. C., Ord. 36, r. 37.**—Order 36, rule 37, of the Rules of the Supreme Court, as to evidence in mitigation of damages in actions for libel or slander, does not alter the common law as laid down in *Scott v. Sampson* ((1882) 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408). The case of *Scaife v. Kemp & Co.*

([1892] 2 Q. B. 319; 61 L. J. Q. B. 515; 60 L. T. 589—Div. Ct.) is not an authority to the contrary.

*MANGENA v. WRIGHT*, [1909] 2 K. B. 958; 78 [L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534—Phillimore, J.

**5. Two Actions for Two Publications of Same Libel—Admission by Defendant in First Action that Libel Defamatory and Untrue—Pleading in Second Action of Fair Comment and of Privilege—Estoppel.**—If, in an action for libel, a defendant has admitted that certain charges which he made against the plaintiff were both defamatory and untrue, when sued subsequently for another publication of them he is not precluded from raising by his pleading the defences of fair comment and of privilege.

*MANGENA v. WRIGHT*, [1909] 2 K. B. 958; 78 [L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485—Phillimore, J.

**6. Particulars Containing Imputations on Plaintiff Not Contained in Alleged Libel—Fair Comment—Order of Judge in Chambers Restricting Particulars and Ordering Further Particulars.**—The defendants in a libel action pleaded in paragraph 9 of their defence that "in so far as the said words consist of statements of fact the same in their natural and ordinary signification were true in substance and in fact; in so far as the said words consisted of comment, it was fair comment upon a matter of public interest, namely, the facts." Particulars were given to show that the matter complained of was a matter of public interest, and circumstances were stated outside the statements made in the article complained of to show that the comment upon "the said facts" was fair comment. The plaintiff contended that the particulars embarrassed him in his action, and Channell, J., made the following order:—"The defendants to amend the particulars under paragraph 9 of the defence by distinguishing and stating separately in the particulars the statement of facts made in their alleged libel which they justified as true in substance and in fact, and which they relied on as being matter on which they were entitled to comment, and by striking out any allegations of fact which do not come under one of those heads." The defendants appealed.

The Court allowed the appeal.

*Digby v. Financial News, Ltd.* ([1907] 1 K. B. 502; 23 T. L. R. 117—C. A.) considered and approved.

*LYONS v. FINANCIAL NEWS, LD., AND OTHERS*, [53 Sol. Jo. 671—C. A.

### (d) Privilege.

**7. Copy of a Public Document—Receivership Notice Registered at Somerset House—Error in Notice—Privilege—Justification—Companies Act, 1907 (7 Edw. 7, c. 50), s. 11 (2).**—The defendants published in their newspaper a copy of certain notices of receiverships registered at Somerset House under the Companies Act of 1907. One of these notices was as follows: "John Jones and Sons (Limited) (Engineers,



### I. Libel—Continued.

Loughborough)." The words in brackets did not appear in the register, but were added by the defendants in place of the number under which the papers were filed, as there were more than one company registered as John Jones and Sons (Limited). It turned out that, by a mistake, the plaintiffs' number had been applied to this notice, which in fact referred to another firm than the plaintiffs. The plaintiffs were solvent, and no receiving order had been made against them, and they claimed damages for libel. Darling, J., held that as the defendants had not copied the register *simpliciter* they had no defence to the action, and he directed the jury that the only question for them was that of damages. The defendants appealed.

**HELD**—not merely that there had been misdirection, but that the defendants were entitled to judgment either on the ground of privilege or justification, that the legislature had decided in the public interest that an open record should be kept of receivership orders; that newspapers that published such registrations were simply assisting the legislature to carry out that object, and that therefore copies of such notices were privileged.

Decision of Darling, J., reversed.

**JOHN JONES AND SONS, LD. v. FINANCIAL TIMES,** [LD., 25 T. L. R. 677; 53 Sol. Jo. 614—C. A.]

**8. Parliamentary Paper—Paper Printed as a Blue-book—Extract from Paper—Liability of Persons Publishing Extract—Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 3.**—Any person who *bonâ fide* and without malice publishes an extract from or an abstract of a Parliamentary Paper is protected by sect. 3 of the Parliamentary Papers Act, 1840, against an action of libel brought in respect of a statement contained in such extract or abstract.

*Per* Darling, J. (98 L. T. 640; 24 T. L. R. 610).

**ON APPEAL**—reversed on the facts, *i.e.*, on the ground that part of the defamatory matter was a headline forming no part of the Parliamentary Paper in question.

**MANGENA v. EDWARD LLOYD, LD.,** 99 L. T. [824; 25 T. L. R. 26—C. A.]

**9. Publication of Matter of a Public Nature and Interest for Public Information—Privilege.**—The publication of a matter of a public nature and of public interest and for public information is privileged, provided it is published with the honest desire to afford the public information and with no sinister motive.

**MANGENA v. WRIGHT,** [1909] 2 K. B. 958; 78 [L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485—Phillimore, J.]

**10. Report of Official Receiver—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), Sched. I., s. 3.**—A report by the Official Receiver under sect. 3 of Sched. I. of the Companies (Winding-up) Act, 1890, dealing with the affairs of a company is absolutely privileged.

**Bottomley v. Brougham** ([1908] 1 K. B. 584; 77 L. J. K. B. 311; 99 L. T. 111; 24 T. L. R. 262; 52 Sol. Jo. 225) approved.

Decision of Lawrence, J., affirmed.

**BURR v. SMITH AND OTHERS,** [1909] 2 K. B. 306; [78 L. J. K. B. 889; 101 L. T. 194; 25 T. L. R. 542; 53 Sol. Jo. 502; 16 Manson, 210—C. A.]

**11. Action against Company—Privilege of Writer of Libel—No Malice—Evidence of Malice in other Officials of Company.**—Where letters containing an alleged libel have been written on a privileged occasion by an official of a company and there is no evidence of malice on the part of that official, but there is evidence of malice on the part of other officials of the company in connection with the letters, the malice of the latter may destroy the privilege pleaded by the company in an action brought against them.

**JONES v. GREAT CENTRAL RY.,** *Times*, [June 16th, 1909—Bucknill, J.]

**12. Justification Pleaded as well as Privilege—Malice.**—The mere fact that a defendant in a libel action attempts in the course of the action to justify the charges complained of as libellous is not in itself evidence of malice so as to deprive the defendant of the defence of privilege.

**POPE v. O'DRISCOLL,** *Times*, May 28th, 1909—[C. A.]

### (e) Publication.

**13. Letter Addressed to Solicitor at His Office Opened by Partner in Course of Business—Evidence for the Jury.**—The defendant wrote and addressed a libellous letter to the plaintiff, a solicitor, at his office. The letter was opened by the plaintiff's partner in the course of business. The jury found that the letter was likely to be opened by the plaintiff's partner or clerk in the course of business, but that such a possibility was not within the defendant's knowledge.

**HELD**—that there had been no publication as, in the absence of any finding of intention on the part of the defendant, acts done by the plaintiff's partner or clerk could not be regarded as publication by the defendant.

Decision of Phillimore, J., reversed.

**SHARP v. SKUES,** 25 T. L. R. 336—C. A.]

**14. Report by Inspector-General in Companies' Liquidation to Board of Trade—Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 29.**—An action is not maintainable against the Inspector-General in Companies' Liquidation in respect of a report made by him to the Board of Trade under sect. 29, sub-sect. 2, of the Companies (Winding-up) Act, 1890, in reference to companies in liquidation, inasmuch as the Inspector-General reports merely to the Board of Trade as its officer, and the fact that this report comes into the hands of superior officers of the Board of Trade does not constitute publication of the report by him.

Decision of Lawrence, J., affirmed.

**BURR v. SMITH AND OTHERS,** [1909] 2 K. B. [306; 78 L. J. K. B. 889; 101 L. T. 194; 25 T. L. R. 542; 53 Sol. Jo. 502; 16 Manson, 210—C. A.]

## I. Libel—Continued.

## (f) Words Capable of Defamatory Meaning.

15. *Mis-description in Newspaper*—"Prisoners Acquitted."—A newspaper account of a police case in which the accused were acquitted was headed "Prisoners Acquitted." One of the accused brought an action of damages against the newspaper for having falsely and calumniously stated that he had been a prisoner when as matter of fact he had never been arrested or committed to prison.

HELD—that the words "prisoners acquitted" were not libellous.

LEON v. EDINBURGH EVENING NEWS, LD., [1909] S. C. 1014; 46 Sc. L. R. 705—Ct. of Sess.

16. *Heading of Newspaper Paragraph*—"To be Wound Up"—*Petition Refused*.—A newspaper report of an application for the judicial winding-up of a theatre, published on the same day, was headed: "Glasgow Theatre Surprise. 'Grand' to be wound up. Petition in Court." The petition having been eventually refused the company brought an action of damages against the newspaper for having falsely and calumniously represented that the theatre was to be wound up as insolvent.

HELD—that the heading, whether read alone, or in conjunction with the rest of the paragraph, was not libellous.

GRAND THEATRE AND OPERA HOUSE, GLASGOW, LD. v. OUTRAM & CO., LD., [1909] S. C. 1018, n.; 46 Sc. L. R. 913—Ct. of Sess.

## II. SLANDER.

## (a) Actionable per se.

[No paragraphs in this vol. of the Digest.]

## (b) Practice.

[No paragraphs in this vol. of the Digest.]

## (c) Privilege.

17. *Speech at Licensing Sessions—Imputations on Conduct of Business—Defence of Fair Comment—Particulars—Interrogatories—Admissibility of*.—The plaintiffs by their statement of claim alleged that the defendant, as chairman of licensing justices, had made a speech at the general annual licensing meeting commenting on the character of certain public-houses in the district belonging to the plaintiffs, and alleging that the plaintiffs had been guilty of corrupt, dishonest, and fraudulent conduct in and about the carrying on of their business, that the plaintiffs had entered into fraudulent and bogus agreements with their tenants, and that they had conspired with their tenants to withhold information from and to deceive the licensing justices.

In his defence the defendant set up the plea of fair comment. On the application of the plaintiffs, an order was made for particulars to be delivered by the defendant of the materials upon which the plea of fair comment was based. The defendant then applied for and obtained

leave from the Master to administer interrogatories for the examination of the plaintiffs. On appeal to the Judge, the order of the Master was reversed and the whole of the interrogatories were disallowed.

HELD—that all proper interrogatories addressed to the question whether the statements of fact in the chairman's speech were true or untrue were relevant, and that the defendant was entitled without a plea of justification to ask the plaintiffs questions respecting the truth of the allegations in the defendant's speech which the plaintiffs said were defamatory.

Order of Bray, J., varied.

PETER WALKER AND SONS, LD. v. HODGSON, [1909] 1 K. B. 239; 78 L. J. K. B. 193; 99 L. T. 902; 53 Sol. Jo. 81—C. A.

17a. *Speech by Guardian Referring to Conduct of Assistant Overseer—Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 62.*—A speech made by a member of a board of guardians at a meeting of the board with reference to the proper collection of the poor rate in a parish in their union by an assistant overseer is privileged.

Decision of Walton, J. (72 J. P. 511; 6 L. G. R. 1061) affirmed.

MAPEY v. BAKER, 73 J. P. 289; 53 Sol. Jo. 429; [7 L. G. R. 636—C. A.]

## (d) Special Damage.

18. *Imputation of being Drunk on Licensed Premises—Special Damage—Threat of Future Temporal Loss.*—Words spoken of a person imputing that he had been drunk on licensed premises are not actionable without proof of special damage; and a mere threat that the person of whom the words are spoken may suffer temporal loss in the future, e.g., by being removed from the directorate of a company unless he can vindicate his character, is not special damage within the rule.

MICHAEL v. SPIERS AND POND, LD., 101 L. T. [352; 25 T. L. R. 740—Lawrence, J.]

## III. TRADE LIBEL.

19. *False Representation as to Retirement from Business—Special Damage—General Damage—Evidence.*—On the dissolution of a partnership carrying on business as ladies' tailors under the name "Arthur & Co.," one partner, B., brought his share of the goodwill into a new partnership under the name "Arthur." Part of the stock of the former business was bought by D. & Co., who advertised and issued a circular to the effect that "Arthur & Co." were retiring from business and that D. & Co. were offering all their stock for sale at reduced prices. The new partnership claimed an injunction and damages for untrue representation. No evidence of specific damage was tendered, and the only evidence of general damage was a statement by B. that he had done less business with his former customers and as the business was personal his customers would not come if they thought they would not see him.

HELD—that the circular was untrue, and that there was sufficient evidence to hold that the

**III. Trade Libel—Continued.**

circular was in law malicious, but that with regard to damage, although evidence as to loss of business might be of a general nature, the evidence in this case only amounted to the plaintiffs' belief that the circular would damage them, and that the action must be dismissed, but without costs.

CONCARIS *v.* DUNCAN & Co., [1909] W. N. 51  
[—Eve, J.]

**IV. CRIMINAL PROCEDURE.**

[No paragraphs in this vol. of the Digest.]

**LIBRARY.**

*See* LOCAL GOVERNMENT.

**LICENCE.**

In respect of game—*See* GAME; SPORT.

In respect of land—*See* REAL PROPERTY; EASEMENTS.

In respect of patent—*See* PATENTS AND INVENTIONS.

For marriage—*See* HUSBAND AND WIFE.

In respect of minerals—*See* MINES, MINERALS AND QUARRIES.

In respect of hawkers and pedlars—*See* MARKETS AND FAIRS.

For sale of intoxicants—*See* INTOXICATING LIQUORS.

For music and dancing—*See* THEATRES, MUSIC HALLS, AND SHOWS.

For cabs, etc., and drivers—*See* STREET TRAFFIC.

To carry gun, etc.—*See* REVENUE; GAME.

Excise—*See* REVENUE.

Generally—*See* REVENUE.

**LIEN.**

*See* ADMIRALTY; BAILMENT; BANKERS, No. 1; BILLS OF SALE; BUILDERS; CARRIERS, No. 1; SHIPPING; SOLICITORS.

**LIEN IN EQUITY.**

[No paragraphs in this vol. of the Digest.]

**LIFE INSURANCE.**

*See* INSURANCE.

**LIGHT.**

*See* EASEMENTS.

**LIGHT RAILWAYS.**

*See* TRAMWAYS AND LIGHT RAILWAYS.

**LIMITATION OF ACTIONS.**

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*See also* DOWER, No. 1; EXECUTORS, No. 20; FACTORIES, Nos. 2, 3; HIGHWAYS, Nos. 13, 14; LUNATICS, No. 4; POOR LAW, No. 5; PUBLIC AUTHORITIES, No. 1; WILLS, No. 50.

**I. MISCELLANEOUS.**

1. *Highway—Repair—Extraordinary Traffic—Locomotives Act, 1898* (61 & 62 Vict. c. 29), s. 12, sub-s. 1.]—The words "completion of the contract or work" in sect. 12, sub-sect. 1, of the Locomotives Act, 1898, mean completion of the constructional work under the contract, with reference to which haulage has to be done and damage to roads arises. Accordingly, where a contract was for the construction of a watertight reservoir, it was held that the work was completed, not at the date when water was first let into the reservoir, which was found to leak, but at the date when the reservoir was finally rendered watertight.

Decision of Div. Ct. (99 L. T. 168; 72 J. P. 301; 6 L. G. R. 936) reversed.

REIGATE RURAL DISTRICT COUNCIL *v.* SUTTON [DISTRICT WATER CO.; EWART, THIRD PARTY, [1909] W. N. 28; 78 L. J. K. B. 315; 100 L. T. 354; 73 J. P. 161; 25 T. L. R. 266; 53 Sol. Jo. 243—C. A.]

**II. ACKNOWLEDGMENT OF DEBT.**

*See also* No. 8, *infra*.

2. *Bond—Co-obligors—Acknowledgment in Writing—Joint and Several Liability—Secondary Evidence—Civil Procedure Act, 1833* (3 & 4 Will. 4, c. 42), ss. 3, 5.]—An acknowledgment in writing by one of several persons liable jointly and severally on a bond is an acknowledgment



**II. Acknowledgment of Debt—Continued.**

within sect. 5 of the Civil Procedure Act, 1833. Secondary evidence may be given of the contents of letters containing such an acknowledgment in writing where the letters are proved to have been lost.

Decision of Channell, J. ([1909] 1 K. B. 577; 78 L. J. K. B. 504; 100 L. T. 457; 25 T. L. R. 283) affirmed.

READ v. PRICE, [1909] 2 K. B. 724; 78 L. J. [K. B. 1137; 100 L. T. 60; 25 T. L. R. 701—C. A.]

**3. Bond—Co-obligors—Joint and Several Liability—Acknowledgment by Executor of One Obligor—Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), ss. 3, 5.]**—An acknowledgment in writing by the executor of one of several persons liable jointly and severally on a bond is not an acknowledgment within sect. 5 of the Civil Procedure Act, 1833.

READ v. PRICE, [1909] 1 K. B. 577; 78 L. J. [K. B. 504; 100 L. T. 457; 25 T. L. R. 283—Channell, J.]

No appeal on this point. See S. C., *supra*.

**4. Unconditional Acknowledgment—Implied Promise to Pay—Request for Time.]**—The defendant wrote two letters on which the plaintiff relied. The first contained the words, "I am sorry I cannot enclose cheque in reply to same. I trust, however, it will not be very much longer before I can do so. . . . I indeed regret the long delay that has occurred"; the second, "I admit I owe your client the sum of £210 5s., but I cannot meet this liability at the moment, although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan."

HELD—that a request for time to pay a debt is not sufficient to rebut a promise to pay implied in an unconditional acknowledgment of the debt, and that either or both of the letters were sufficient to take the case out of the Statute of Limitations.

COOPER v. KENDALL, [1909] 1 K. B. 405; 78 [L. J. K. B. 580; 100 L. T. 251; 53 Sol. Jo. 243—C. A.]

**III. PART PAYMENT.**

[No paragraphs in this vol. of the Digest.]

**IV. JUDGMENT.**

[No paragraphs in this vol. of the Digest.]

**V. FRAUD.**

[No paragraphs in this vol. of the Digest.]

**VI. RECOVERY OF MONEY CHARGED UPON LAND.**

[No paragraphs in this vol. of the Digest.]

**VII. RIGHTS TO REAL PROPERTY.**

See also COMPULSORY PURCHASE, No. 7.

**5. Adverse Possession—Actual Possession of Part of Area—Constructive Possession of Wider Area—Real Property Limitation Act, 1833 (3 & 4**

Will. 4, c. 27), s. 34.]—The authorities commencing with *Lord Dartmouth v. Spittle* (24 L. T. 67) down to *Thompson v. Hickman* ([1907] 1 Ch. 550) establish that where a title is founded on adverse possession the title will be limited to that area of which actual possession has been enjoyed, and that, as a general rule, constructive possession of a wider area will only be inferred from actual possession of the limited area if the inference of such wider possession is necessary in order to give effect to contractual obligations or to preserve the good faith and honesty of a bargain.

GLYN v. HOWELL, [1909] 1 Ch. 666; 78 L. J. [Ch. 391; 100 L. T. 324; 53 Sol. Jo. 269—Eve, J.]

**6. Long Lease—Conditional Surrender—Corporate Land of Municipal Corporation—Lease for Lives—Consent of Local Government Board not Obtained—Lease Granted in Consideration of Surrender of Existing Lease—Estoppel—Real Property Limitation Acts—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 108—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72.]**—In 1892 a municipal corporation, in order to compromise an action between themselves and their lessee for the residue of a term of 300 years that would expire in 1899, accepted the surrender of the long lease and granted a new lease rent free for the lessee's life. The sanction of the Local Government Board was, however, not obtained to the lease of 1892, and that lease was consequently void or voidable. The lessee remained in possession for more than twelve years after 1892, and set up a title to the freehold under the Real Property Limitation Acts on the footing that the lease of 1892 was bad, and that the long lease had been surrendered.

HELD that—whether the lease of 1892 was void or voidable (as to which the Court expressed no opinion), there was only a conditional surrender of the long lease, and as the lease of 1892 was void or voidable the surrender was inoperative; that, consequently, the title of the corporation to possession did not accrue till 1899; and that the lessee's claim to a prescriptive title failed.

Decision of Div. Ct. (99 L. T. 612; 72 J. P. 465; 6 L. G. R. 916) affirmed.

CANTERBURY CORPORATION v. COOPER, 100 [L. T. 597; 73 J. P. 225; 53 Sol. Jo. 301; 7 L. G. R. 908—C. A.]

**7. Adowson—Equitable Mortgage—Stale Demand—Laches.]**—An adowson was mortgaged in 1860. By the mortgage deed the mortgagor covenanted to grant and release the adowson when required, and a power of sale was given to the mortgagees, their heirs, executors or administrators. The mortgagor having been adjudicated bankrupt in 1863, the defendant in 1892 purchased the equity of redemption from the official receiver. There had been no payment of principal or interest since the date of the mortgage. On a summons taken out for enforcing the mortgage by foreclosure:—

**VII. Rights to Real Property—Continued.**

**HELD**—that, though the Statutes of Limitation were not applicable, a court of equity would always refuse to aid stale demands, and that therefore and on the ground of *laches* on the part of the mortgagees the summons must be dismissed.

**BROOKS v. MUCKLESTON**, [1909] 2 Ch. 519 ;  
[101 L. T. 343—Joyce, J.]

**VIII. MORTGAGOR AND MORTGAGEE.**

**8. Extinction of Mortgagee's Title—Subsequent Acknowledgment in Writing—Revival of Covenant or Charge.**—A subsequent acknowledgment in writing cannot revive either a mortgagee's title which has been extinguished by the Statute of Limitations, or a covenant in the mortgage, or a charge on the land.

**BEAMISH v. WHITNEY**, [1909] 1 L. R. 360—  
Ross, J.

**IX. ACTIONS AGAINST EXECUTORS.**

[No paragraphs in this vol. of the Digest.]

**X. TRUSTEES.**

**9. Breach of Trust—Acknowledgment of Debt—Entries in Books of Account of Firm of Solicitors—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1) (b).**—In an action against trustees for breach of trust the defendants pleaded the Statute of Limitations and sect. 8 of the Trustee Act, 1888. The plaintiffs relied upon entries in the books of the solicitor, since deceased, who acted for the trustees, showing payments of interest on the funds sought to be recovered in the action. The books in which the entries were made were not the books of the solicitor himself, but were the books of the firm of which he was a partner.

**HELD**—that these books were not admissible in evidence as entries by a deceased person against interest.

**HELD ALSO**—that an admission by the trustees of the existence of moneys uninvested in their hands was not an admission for the benefit of the tenant for life, and that the trustees were entitled to rely as against such tenant for life on the Statute of Limitations, having regard to sect. 8 of the Trustee Act, 1888.

**IN RE FOUNTAINE, IN RE DOWLER, FOUNTAINE v. AMHERST (LORD)** [1909] 2 Ch. 382 ; 78 L. J. Ch. 648 ; 101 L. T. 83 ; 25 T. L. R. 689—C. A.

**LIMITATION OF LIABILITY.**

*See ADMIRALTY ; SHIPPING.*

**LIQUIDATED DAMAGE.**

*See DAMAGES.*

**LIQUIDATION.**

*See COMPANIES.*

**LIS PENDENS.**

*See SALE OF LAND.*

**LITERARY PROPERTY.**

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**LIVERPOOL COURT OF  
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*See COURTS.*

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*See BAILMENT ; NEGLIGENCE.*

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**LOCAL GOVERNMENT.****I. IN GENERAL.**

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Local Government—Continued.

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See also BURIAL, No. 2; CHARITIES; COMPULSORY PURCHASE, No. 8; EDUCATION; ELECTIONS; EXPLOSIVES; FOOD AND DRUGS; HIGHWAYS; INJUNCTIONS, No. 4; MAGISTRATES, Nos. 4, 6; METROPOLIS; NEGLIGENCE; PUBLIC AUTHORITIES; PUBLIC HEALTH; RATES; SEWERS AND DRAINS; STREET TRAFFIC; TELEGRAPHS; TIME, No. 5; TRAMWAYS; WATERS, Nos. 4, 5, 6, 9.

I. IN GENERAL.

(a) Accounts and Audit.

1. *Audit—Surcharge—Auditor's Certificate not Signed in Presence of Public—Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 35.*—It is not essential to the validity of an auditor's certificate surcharging a guardian that it should have been signed at a session of the audit to which the public had access.

R. v. THE LOCAL GOVERNMENT BOARD, EX PARTE WARREN, 100 L. T. 434; 73 J. P. 186; 25 T. L. R. 223; 7 L. G. R. 468—Div. Ct.

2. *Urban District Council—Borrowing without Sanction—Overdraft at Bankers—Interest on Overdraft—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 233, 234.*—The defendants in 1903 obtained the sanction of the Local Government Board to a loan for the erection of municipal buildings. They spent, over and above the amount of the loan, a further sum of £18,350, which was borrowed from their bankers by way of overdraft. In 1907 the defendants applied to the Local Government Board for leave to borrow the amount thus overspent, but as to £4,910, a portion thereof, sanction was refused. In October, 1908, the defendants proposed to levy a general district rate to enable them to pay the £4,910, but were restrained by the Court from doing so until the trial of this action. Before action brought, the defendants had paid a sum of £855 for interest on their bank overdraft, and they proposed to pay a further sum of £900 for interest. The most recent of the items composing the £4,910 had been expended more than a year before the date of the proposed rate.

HELD—that the loan of the sum of £4,910 to the defendants from the bank by way of overdraft, without the sanction of the Local Government Board, was illegal; that the defendants must be restrained from applying any part of the general district fund or rate or any other public fund or rate under their control in repayment of the said loan or any part thereof; that the defendants were not entitled to make any payment of interest upon money borrowed without the sanction of the Local Government Board, whether such borrowing was by means of overdraft or otherwise; that the payment by the defendants of the £855 was unlawful and ought to be disallowed by the auditor on auditing defendants' accounts, but this declaration was in no way to affect the power of the Local Government Board to remit such disallowed payment, though unlawfully made, under any statute enabling them so to do; that the defendants must be perpetually restrained from making any further payments of interest upon money borrowed without the sanction of the Local Government Board or other statutory sanction, whether such borrowing be by way of overdraft or otherwise.

ATTORNEY-GENERAL v. TOTTENHAM URBAN [DISTRICT COUNCIL, 73 J. P. 437—Eady, J.

(b) Areas and Boundaries.

[No paragraphs in this vol. of the Digest.]

(c) Burial.

[No paragraphs in this vol. of the Digest.]

(d) Bye-laws (other than Building Bye-laws), and Local Acts.

[No paragraphs in this vol. of the Digest.]

(e) Contracts.

3. *Seal—Contract with Municipal Corporation—Statutory Power to Trade—Contract not under Seal—Contract to Pay Implied from Acceptance of Benefit—Transaction Necessary for Carrying on Trade.*—A borough council, being



**I. In General—Continued.**

the electric light authority for the borough, and having statutory power to supply electricity, contracted to supply electricity to the plaintiffs' premises by a certain date. The contract was not under seal, but was alleged to have been made by officers of the electric light committee of the borough council who had, or were held out by the council as having, authority to make the said contract. In an action for damages for breach of the said contract, it was

**HELD**, by Ridley, J.—(1) that the electric light committee had, under bye-laws of the council, authority to execute and perform all the duties and powers of the council under the Electric Lighting Acts and the Electric Lighting Order of the borough.

(2) That the contract was binding on the defendants, notwithstanding that it was not under seal.

The C. A. reversed the decision on the ground that there was no evidence of the making of the contract, or (at any rate) none of the officers' authority to make it.

Decision of Ridley, J. ([1908] W. N. 52; 72 J. P. 129; 24 T. L. R. 322; 6 L. G. R. 406; 52 Sol. Jo. 281) reversed.

**BOURNE AND HOLLINGSWORTH v. MARYLEBONE BOROUGH COUNCIL**, [1909] W. N. 14; 72 J. P. 306; 24 T. L. R. 613; 6 L. G. R. 1141—C. A.

**4. Contract to Lay Sewer—Variations Ordered—Basis for Charges—Quantum meruit as on a New Contract—Contract Price plus Extras—Extras not Ordered in Writing—No final Certificate—Errors in Plans.**—The plaintiff contracted to carry out sewerage works for the defendant council. In consequence of orders the work was varied and rendered much more expensive. The plaintiff claimed to be entitled to payment as on a *quantum meruit* based on the cost and value of the work.

**HELD**—that he was only entitled to be paid on the basis of the contract price plus extras.

The engineer had given no final certificate, and many of the extras were not ordered in writing; but the defendants had withdrawn their plea of no certificate and the plaintiff had withdrawn a charge of misconduct.

**HELD**—that upon this state of the pleadings, the referee could deal with the extras on their merits.

**JACKSON v. ROMFORD RURAL DISTRICT COUNCIL**, 73 J. P. 248—Off. Ref.

**(f) Meetings.**

[No paragraphs in this vol. of the Digest.]

**(g) Members, Officers and Servants.****(a) In General.**

See also MASTER AND SERVANT, No. 109.

**5. Police—Pension—Meaning of "Police Force"—Service in Royal Irish Constabulary—Subsequent Service as Chief Constable of English County—Pension—Funds from which Payable—**

*Determination of Proportions by Treasury Police Act, 1890* (53 & 54 Vict. c. 45), ss. 14, 33.

—The expression "police force with a salary paid out of money provided by Parliament," in sect. 14 of the Police Act, 1890, is not limited by the definition of "police force" in sect. 33 to police forces maintained by one of the police authorities mentioned in the third schedule, but includes the Royal Irish Constabulary, and, therefore, a person who has served as district inspector in the Royal Irish Constabulary, and has afterwards been chief constable of an English county, is on his retirement entitled to reckon his entire period of service in both capacities for the purpose of pension, and the Treasury must, under sect. 14 of the Act, determine the proportions in which the pension is payable from money provided by Parliament and from the police pension fund.

**R. v. THE LORDS COMMISSIONERS OF H.M. TREASURY, EX PARTE THE DEVON STANDING JOINT COMMITTEE AND OTHERS.** [1909] 2 K. B. 183; 78 L. J. K. B. 680; 100 L. T. 896; 73 J. P. 299; 25 T. L. R. 450; 7 L. G. R. 746—Div. Ct.

**6. Surveyor—Part-time Officer of Urban District Council—Practice to Pay Commission as Remuneration for Extra Work—Surveyor Requested to Report on Drainage Scheme and Prepare Plans, etc.—Claim for Extra Remuneration—Contract over £50 not Scaled—Officer Interested in Contract re Drainage Scheme—Express Resolution of Council not a Condition Precedent to Liability to Pay Extra Remuneration—Public Health Act, 1875, ss. 174, 193.**—A long-continued practice under which a part-time officer of an urban district council has been paid extra remuneration for extra work done by him may give rise to an obligation upon the council to pay for further extra work done by the officer, although nothing has been previously said as to extra remuneration being paid therefor, and although no resolution to pay for the extra services has been passed by the council.

**MANSBRIDGE AND ANOTHER v. BARNET URBAN DISTRICT COUNCIL**, 73 J. P. 255—County Ct.

**7. Election of Clerk to Rural District Council—Irregularity in Taking and Declaring Poll—Writ of Mandamus—Discretion of Court.**—A writ of mandamus in a civil matter is in the discretion of the Court, and the King's Bench Division in any particular case will take all the circumstances into consideration, and will not grant a writ of mandamus to compel a rural district council to proceed to a new election of a clerk where the election already taken, though irregular in mode and declaration, is substantially correct, and would not have had a different result if taken regularly.

Delay for a purpose by a prosecutor is a matter to be taken into consideration by the Court in such cases.

Where the circumstances have so altered in the meantime as to put one of the parties in a more advantageous or less advantageous position than at the former election, that is a matter to be considered by the Court in the exercise of its

**I. In General—Continued.**

discretion on an application for a writ of mandamus in a civil cause.

R. (CARTY) *v.* NEWRY URBAN DISTRICT, 43 [I. L. T. 172—Div. Ct., Ireland.

**(b) Disqualifications.**

**8. Member of Harbour Board—Concerned in a Contract—Election of Chairman—Shareholder in a Joint Stock Company Contracting with a Harbour Board—Commissioners Clauses Act, 1847 (10 Vict. c. 16).]**—A member of a harbour board who becomes concerned in a contract with such board during his membership becomes thereby disqualified under sect. 9 of the Commissioners Clauses Act, 1847.

A member of a harbour board who is a shareholder in a joint stock company is not disqualified by such joint stock company entering into a contract with the harbour board.

There must be the clearest evidence against a relator of animus on his part, or acquiescence in a member acting while disqualified, to make such objections good grounds for the exercise of the discretion of the Court in refusing to grant a writ of *quo warranto* to such a relator.

R. (McCOWEN) *v.* KELLEHER, 43 I. L. T. 270—[Div. Ct., Ireland.

**(h) Powers.**

See also No. 2, *supra*.

**9. Power to Corporation to Construct Wharf—Provision that Business of Wharfinger Not to be Carried On—Letting of Land with Right to Use Wharf Free of Dues—Ultra Vires.]**—In 1896 the defendants by a private Act were empowered to construct and maintain a wharf wall and embankment 900 feet in length, but it was provided that the defendants should not carry on or permit to be carried on upon the said wharf wall and embankment the business of wharfingers or warehousemen. They subsequently constructed a wharf wall and embankment, but only 600 feet in length, there being an old quay called Moore's Wharf occupying the remaining 300 feet. Thereafter the defendants granted a lease to one V., a timber merchant, of a part of their land with the use of their wharf for the purpose of loading or unloading from or to craft timber to be dealt with by him as a timber merchant and not as a wharfinger, free of all dues or charges whatsoever. V. paid an enhanced rent by reason of there being let to him with the land the right to use the wharf free of all dues, and on three occasions he had exercised this right for the purposes of his business, having had three barges unloaded at Moore's Wharf.

**HELD**—that the defendants had not by letting the land to V. on the terms above stated carried on or permitted to be carried on the business of wharfingers.

Decision of Eady, J. (99 L. T. 793; 72 J. P. 493; 25 T. L. R. 29; 6 L. G. R. 1154) affirmed.

ATTORNEY-GENERAL *v.* PLYMOUTH CORPORATION, 100 L. T. 742; 73 J. P. 274; 25 T. L. R. 418; 7 L. G. R. 710—C. A.

**10. Municipal Corporation—Corporation Land—Sale in Consideration of Perpetual Rent-charge—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 108, 109—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 72.]**—A municipal corporation has power, with the consent of the Local Government Board, to dispose of its corporate land in consideration of the grant of a perpetual yearly rent-charge.

MAYOR, ETC., OF SCARBOROUGH *v.* COOPER, [1909] W. N. 228; 101 L. T. 552; 26 T. L. R. 88—Joyce, J.

**(i) Practice.**

[No paragraph in this vol. of the Digest.]

**(j) Tort.**

[No paragraphs in this vol. of the Digest.]

**II. BUILDINGS AND BUILDING BYE-LAWS.****(a) Building Line.**

[No paragraph in this vol. of the Digest.]

**(b) Continuing Offence.**

[No paragraphs in this vol. of the Digest.]

**(c) Crown.**

[No paragraphs in this vol. of the Digest.]

**(d) Deposit and Approval of Plans.**

[No paragraphs in this vol. of the Digest.]

**(e) Exemptions and Dispensations.**

[No paragraphs in this vol. of the Digest.]

**(f) Floors.**

[No paragraphs in this vol. of the Digest.]

**(g) Notice.**

[No paragraphs in this vol. of the Digest.]

**(h) Res Judicata.**

[No paragraphs in this vol. of the Digest.]

**(i) Remedies for Breach.**

[No paragraphs in this vol. of the Digest.]

**(j) Waterworks.**

[No paragraphs in this vol. of the Digest.]

**(k) Words: "New Buildings," "Building," "Sign," "Letting," etc.**

**11. "New Building"—Railway Carriage converted into Residence—Power to Demolish—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 157, 159.]**—The plaintiff purchased land on which stood an old railway carriage previously used as a refreshment room. By slight alterations he converted it into a residence in which he lived. The defendants, after serving a notice on the plaintiff which he disregarded, demolished this residence as being a new building in contravention of a bye-law made pursuant to the Public Health Act, 1875, s. 157. By sect. 159 of that Act the conversion into a dwelling-house of any building not originally constructed for human habitation is to be considered the erection of a new building. The plaintiff contended that the defendants were not justified in doing more than removing the work

# 11. Buildings and Building Bye-laws — Continued.

actually done by him in converting the railway carriage into a dwelling-house. On appeal by the plaintiff from the county court :

**HELD**—that, by sect. 159 of the Public Health Act, 1875, the conversion into a dwelling-house of such a building had the effect of making the whole building and not merely the altered part into a “new building” subject to the defendants’ bye-laws.

Decision of Div. Ct. ([1909] 1 K. B. 263; 78 L. J. K. B. 238; 100 L. T. 124; 73 J. P. 100; 25 T. L. R. 173; 53 Sol. Jo. 163; 7 L. G. R. 199) affirmed.

**HANRAHAN v. LEIGH URBAN DISTRICT COUNCIL**, [1909] 2 K. B. 257; 78 L. J. K. B. 725; 101 L. T. 192; 73 J. P. 308; 25 T. L. R. 540; 53 Sol. Jo. 502; 7 L. G. R. 614—C. A.

**12. “New Building” — Alteration of Old Building—Reconstruction of Old Shed—Notice—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 159.**—Under bye-laws informations were laid against the respondent for having failed to give the notices required to be given on the erection of a new building. The respondent was the occupier of a three-sided wooden shed. Two of the sides were straight, while the third was a curved boundary wall separating the land from the street. The shed consisted of two wooden posts erected on the wall and of four brick piers on the opposite side, the spaces between being filled with wood, and the principals of the roof were placed on one side on the brick piers and on the other on the wooden posts on the boundary wall. The piers had partly fallen down, letting down the roof. The following works had been executed: the roof had been entirely stripped and constructed in a different manner, the piers had been raised to their original height, the wooden props had been replaced by iron columns and the whole of the wooden walls replaced with galvanised iron, and a new end wall and door had been erected.

**HELD**—that the building was a new building, and the respondent ought to have given the notices required under the bye-laws.

**LEE v. BARTON**, 101 L. T. 600; 73 J. P. 509; [7 L. G. R. 1145—Div. Ct.

**13. “In or Abutting on or Adjoining” Street—Hoarding for Advertising Purposes—Hoarding Erected a Distance from Street on Vacant Land—Access of Public to Land and Hoarding—Leicester Corporation Act, 1897 (60 & 61 Vict. c. ccxviii.), s. 31.**—The appellants for advertising purposes erected on a plot of building land a hoarding some 84 feet long and 10 feet high. It stood between two rows of houses, and was nearly 11 feet back from the footway of the street, being some inches behind the front main walls of the houses on each side and filling the intervening space. No public rights existed over the land, but there was no fence between the street and the hoarding, and the land and hoarding were accessible to persons using the street.

Upon informations under a local Act for

erecting the hoarding “in or abutting on or adjoining” the street, without the consent of the local authority, the justices found as a fact that the hoarding was “in” the street, and convicted the appellants.

**HELD**—that the hoarding was either “in” or “abutting on” or “adjoining” the street, and that the conviction was right.

**ROCKLEYS, LD. v. PRITCHARD**, 101 L. T. 575; [7 L. G. R. 1069—Div. Ct.

## III. MISCELLANEOUS.

**14. Local Inquiry—Expenses of—Local Government Acts, 1888 (51 & 52 Vict. c. 41), s. 57; and 1894 (56 & 57 Vict. c. 73), s. 72, sub-s. 4.**—A county council, upon the application of certain inhabitants in an urban district, directed a local inquiry under sect. 57 of the Local Government Act, 1888, as to the proposed union of the district with an adjoining district, and appointed a barrister as commissioner to hold the inquiry.

**HELD**—that the expenses mentioned in the parenthetical clause in sub-sect. 4 of sect. 72 of the Local Government Act, 1894, meant out-of-pocket expenses, and did not include the remuneration of the commissioner appointed by the county council to hold the inquiry, and, therefore, that the reasonable charges for such commissioner’s remuneration were payable by the county council.

Decision of Grantham, J. (99 L. T. 17; 72 J. P. 322; 24 T. L. R. 612; 6 L. G. R. 952), reversed.

**MIDDLESEX COUNTY COUNCIL v. KINGSBURY [URBAN DISTRICT COUNCIL]**, [1909] 1 K. B. 554; 100 L. T. 421; 73 J. P. 153; 25 T. L. R. 256; 53 Sol. Jo. 227; 7 L. G. R. 463—C. A.

## LOCOMOTIVES.

See **HIGHWAYS; RAILWAYS AND CANALS; STREET TRAFFIC**

## LODGING HOUSES.

See **LANDLORD AND TENANT; PUBLIC HEALTH.**

## LONDON.

See **METROPOLIS.**

## LONDON BUILDING ACT.

See **METROPOLIS.**



## LONDON, PORT OF.

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SHIPPING AND NAVIGATION.

## LORDS, APPEAL TO.

See COURTS: PRACTICE AND PROCEDURE.

## LOTTERIES.

See GAMING AND WAGERING.

## LOWER CANADA.

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LUNATICS AND PERSONS  
OF UNSOUND MIND.

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See also CRIMINAL LAW, No. 19: MASTER  
AND SERVANT, No. 26.

1. *Plaintiff of Unsound Mind—No Next Friend—Inquiry Whether Competent to Retain Solicitor.*—The Court has jurisdiction, on a proper case being made out, to direct an inquiry as to whether a plaintiff was, at the date of the writ, competent to retain a solicitor.

POMERY v. POMERY, [1909] W. N. 158; 53 Sol. Jo. 631—Eve, J.

## III. COMMITTEE AND RECEIVER.

2. *Interim Receiver—Verdict at Inquest of Murder against Alleged Lunatic—Receiver and Manager till Further Order.*—Where a coroner's jury had returned a verdict of "murder" against a man for a fatal attack on his wife, and his sister, having already presented a petition in lunacy, applied for the appointment of an interim receiver, the Court directed the immediate appointment of a receiver and manager "till further order," the expression "interim receiver" being considered inappropriate.

IN RE A. G., 53 Sol. Jo. 615—Vaughan Williams, [L.J.]

3. *Person of Unsound Mind Not so Found—Order for Receiver to Receive and Give Discharge for Dividends, etc.—Practice—Lunacy Act, 1890 (53 Vict. c. 5), ss. 116, 333.*—By an order in lunacy a receiver was authorised to receive and give a discharge for all dividends to which S., a person of unsound mind not so found by inquisition, might be or become entitled. The Bank of England, under whose control some of S.'s stocks were, objected to comply with the order on the grounds that the proper practice as established by *In re Auchmuty* (99 L. T. 462) was to order lodgment of the accrued dividends due to the date of lodgment in Court, that the order should be mandatory in form, and that it should be unconditional and complete in itself.

HELD—that the first objection was untenable, as words to the same effect as in the present order had been deliberately inserted in an order made in the presence of the bank in *In re Sherwell* (not reported); that the effect of the order, though not mandatory in form, was to give to the bank the indemnity provided by sect. 333 of the Lunacy Act, 1890; and that the order was in accordance with the settled practice in lunacy, which ought not now to be disturbed.

*In re Auchmuty* (99 L. T. 462) distinguished. *In re Francis Browne* ([1894] 3 Ch. 412; 63 L. J. Ch. 729; 71 L. T. 365; 43 W. R. 175—C. A.) applied.

IN RE SPURLING, [1909] 1 Ch. 199; 78 L. J. [Ch. 198; 99 L. T. 898—C. A.]

## IV. VESTING ORDER.

[No paragraphs in this vol. of the Digest.]

## V. PROPERTY AND CAPACITY OF LUNATIC.

[No paragraphs in this vol. of the Digest.]

## VI. MAINTENANCE.

See also POOR LAW, II. (b).

4. *Criminal Lunatic—Past Maintenance—Claim by the Treasury—Crown Debt—Statute of Limitations* (21 Jac. 1, c. 16)—*Lunatic Asylums Act, 1853* (16 & 17 Vict. c. 97), s. 104—*Criminal Lunatics Act, 1884* (47 & 48 Vict. c. 64), s. 10, sub-s. 3—*Lunacy Act, 1890* (53 Vict. c. 5), s. 116, sub-s. 4; s. 299, sub-s. 1.—The effect of sect. 10, sub-sect. 3, of the Criminal Lunatics Act, 1884, introducing by reference sect. 104 of the Lunatic Asylums Act, 1853, is to create a statutory

VI. Maintenance—Continued.

liability in a criminal lunatic's estate in respect of his past maintenance when detained in a criminal lunatic asylum, and being in the nature of a Crown debt the full amount thereof as from the date of the coming into operation of the Act of 1884—where the claim extends so far back as that period—is recoverable as such against the estate of the lunatic, and is not limited by the Statute of Limitations to six years' arrears of past maintenance.

IN RE J., [1909] 1 Ch. 574; 78 L. J. Ch. 348; [100 L. T. 281—C. A.

5. *Money Found on Lunatic—Private Patient—Order to Seize—Lunacy Act, 1890* (53 & 54 Vict. c. 5), ss. 240, 299.]—Sect. 299 of the Lunacy Act, 1890, which empowers a magistrate, where it appears to him that a lunatic, chargeable to any union or local authority, has property more than sufficient to maintain his family, if any, to direct a relieving officer of the union or an officer of the local authority to seize sufficient money to pay the expenses of maintenance and incidental expenses of the lunatic, applies not merely to the case of a pauper lunatic but also to that of a lunatic who, having been admitted as a pauper, is afterwards ascertained to be entitled to be classified as a private patient, and such an order may be made on the application of the union or local authority bearing the expense of the maintenance of the lunatic.

R. v. FULHAM GUARDIANS, [1909] 2 K. B. 504; [78 L. J. K. B. 1081; 101 L. T. 537; 73 J. P. 397; 7 L. G. R. 881—Div. Ct.

VII. CREDITORS.

[No paragraphs in this vol. of the Digest.]

VIII. BREACH OF PROMISE.

[No paragraphs in this vol. of the Digest.]

IX. PAUPER LUNATICS.

See POOR LAW, II. (b).

X. FOREIGN LUNATICS.

[No paragraphs in this vol. of the Digest.]

MACHINERY.

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MAGISTRATES.

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See also ANIMALS, Nos. 6, 7; CRIMINAL LAW AND PROCEDURE; HUSBAND AND WIFE, Nos. 50 to 58; INTOXICATING LIQUORS; RATES, No. 1; REVENUE, No. 2; STREET TRAFFIC, II.; TRAMWAYS, No. 3.

I. DISQUALIFICATION OF JUSTICES.

1. *Bias—Subscriber to Society in whose Interest Proceedings Taken.*]—Certain members of a court hearing licensing appeals were subscribers to a society, part of whose work it was to oppose the granting of new licences and to press for the reduction of existing licences.

HELD,—that as they were not members of the society, but merely subscribers to its funds, they were not disqualified from acting as members of the Court.

*Quere* whether membership of such a society would amount to a disqualification.

GOODALL v. BILSLAND AND OTHERS, [1909] [S. C. 1152; 46 Sc. L. R. 555—Ct. of Sess.

II. JURISDICTION AND POWERS OF JUSTICES.

See also CRIMINAL LAW, No. 63; MASTER AND SERVANT, No. 105; WATERS, No. 10.

2. *Appearance of Defendant by Counsel—Offence Punishable Summarily—Decision to Convict—Proof of Previous Convictions—Identity—Warrant to Compel Defendant to Appear—Summary Jurisdiction Act, 1848* (11 & 12 Vict. c. 43), s. 13.]—Where a defendant has been summoned before justices in respect of an offence punishable on summary conviction, and has appeared by counsel or attorney but not personally, and the justices have heard the case and decided to convict, they have no power to issue a warrant for the arrest of the defendant in order that he may be produced in Court and identified for the purpose of proving previous convictions alleged by the prosecution.

R. v. THOMPSON, [1909] 2 K. B. 614; 78 L. J. [K. B. 1085; 100 L. T. 970; 73 J. P. 403; 25 T. L. R. 651; 7 L. G. R. 979—Div. Ct.

3. *Warrant—Power of Withdrawal—Mandamus.*]—A warrant was granted by a magistrate for the arrest of a Mrs. C. and two other persons for conspiring to abduct a child of Mrs. C.'s out of the custody of its appointed guardian. The warrant was never executed against Mrs. C. because of her absence abroad, but the two others were arrested and tried, and one of them was convicted. On an application to the magistrate to withdraw the warrant against Mrs. C. he declined to do so.

HELD, on the facts—that, assuming the magistrate had power, in the exercise of his discretion,

## II. Jurisdiction and Powers of Justices—*Continued.*

to withdraw the warrant, he had exercised his discretion judicially.

HELD ALSO, *per* Darling, J. (and, *semble*, *per* Alverstone, L.C.J.)—that the King's Bench Division has power to issue a *mandamus* ordering a magistrate to withdraw a warrant if it is plain that he has granted it for the arrest of a person for something which is not an offence and for which the person could not be convicted.

*Sed quære*, whether a magistrate, unless so ordered, has power to withdraw a warrant when once he has granted it.

R. v. CROSSMAN, 98 L. T. 760; 72 J. P. 250; 24 [T. L. R. 517; 21 Cox, C. C. 605—Div. Ct.

4. *Licensing—Music Licence—Time For Application—General Annual Licensing Meeting or any Special Session—Oldham Borough Improvement Act, 1865* (28 & 29 Vict. c. cccxi.), s. 227.]—A local Act provided that no house should be used for public entertainment without a licence from the justices for the borough, and that the justices might grant such licences at any special session convened by fourteen days' previous notice.

HELD—that the justices had no right to lay down a rule that applications for these licences must be made only at the general annual licensing meeting.

R. v. OLDHAM LICENSING JUSTICES, EX PARTE [MELLOR, 101 L. T. 430; 73 J. P. 390—Div. Ct.

5. *Husband and Wife—Enforcement of Order for Payment of Weekly Sum to Wife—Imprisonment—Bastardy Laws Amendment Act, 1872* (35 & 36 Vict. c. 65), s. 4—*Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), s. 54—*Summary Jurisdiction (Married Women) Act, 1895* (58 & 59 Vict. c. 39), s. 9.]—Where an order has been made under the Summary Jurisdiction (Married Women) Act, 1895, that a husband shall pay a weekly sum to his wife, such order may be enforced by an order of imprisonment, in default of sufficient distress, without proof that the husband had the means to pay the sum in respect of which he has made default.

R. v. RICHARDSON AND OTHERS, JUSTICES, EX [PARTE SHERRY, [1909] 2 K. B. 851; 101 L. T. 541; 73 J. P. 434; 25 T. L. R. 711—Div. Ct.

6. *Obstructing Footway—"Extenuating Circumstances"—Probation of Offenders Act, 1907* (7 Edw. 7, c. 17), s. 1, (1).]—On an information laid by the police against the respondent for placing a stall on the footway of a certain street contrary to the provisions of a local Act, it was proved that the stall projected over the footway about 16 inches, that in the same street there were other stalls projecting over the footpath causing more obstruction than the respondent's stall; and that no proceedings had been instituted against the owners of those other stalls. The justices dismissed the information under the provisions of sect. 1, sub-sect. 1 of the Probation

of Offenders Act, 1907, owing to the extenuating circumstances under which the offence was committed.

HELD—that there were extenuating circumstances, and that the justices were therefore justified in dismissing the information.

DUNNING v. TRAINER, 101 L. T. 421; 73 J. P. [400; 25 T. L. R. 658; 7 L. G. R. 919—Div. Ct.

7. *Apprehended Breach of the Peace—Recognizances to be of Good Behaviour.*]—An information was laid against a defendant alleging that he intended to lead a procession through the streets of Liverpool on a certain day, that the consequence of his having on a previous occasion led a similar procession through the streets had been a breach of the peace, riot, and damage to property, and that the informant apprehended that similar consequences would ensue again, and praying that the defendant be ordered to find sureties to keep the peace and to be of good behaviour. The magistrate issued a warrant, upon which the defendant was arrested and brought before him on the day prior to that on which the procession was intended to be held. The magistrate then granted a series of adjournments during which the defendant was liberated on his own recognizances and those of two sureties, and ultimately some weeks after the day in question had passed ordered the defendant to enter into his own recognizances for twelve months to keep the peace and be of good behaviour or in the alternative to be imprisoned for four months.

HELD—that in the circumstances the magistrate had jurisdiction to make the order although the date of the intended procession had passed.

R. v. LITTLE AND DUNNING, EX PARTE WISE, [74 J. P. 7; 26 T. L. R. 8—Div. Ct.

8. *Indictable Offences—Magistrates' Order—Sending Forward for Trial—Certiorari.*]—The order made by the magistrates upon a magisterial investigation as to an indictable offence, sending forward an accused person for trial is not an order within the rule that enables magistrates' orders to be brought up and enquired into upon *certiorari* by the King's Bench Division.

R. (Blakeney) v. Justices of Roscommon ([1894] 2 Ir. R. 158) followed.

R. (HASTINGS) v. JUSTICES OF CO. GALWAY, [43 L. T. 185—Div. Ct., Ireland.

9. *Adjournment—Criminal Prosecution for Assault—Adjournment of Criminal Proceedings Pending Determination of Civil Action—Legal Exercise of Magistrates' "Discretion" to Adjourn.*]—A criminal prosecution at the suit of a head constable was brought against M. for an alleged assault on Sergeant C. and Constable B. in the execution of their duty. Previous to the issue of the summons the defendant's solicitor wrote to C. and B. threatening a civil action for damages for assault arising out of the same transaction; and at the date of the summons coming on for hearing a writ for damages had been actually issued. The defendant's solicitor on the hearing of the summons asked for an adjournment on the ground that a decision in



## II. Jurisdiction and Powers of Justices—Continued.

the criminal proceedings might influence the civil action. The magistrates upon this ground granted an adjournment for two months, intimating they would grant a further adjournment if the civil action was not then concluded.

**HELD**—that the magistrates were wrong in adjourning upon such a ground; that such a ground was extraneous to the case before them, and was, therefore, not a legal exercise of their discretion.

**R. (DEENY) v. JUSTICES OF TYRONE**, [1909] 2 [I. R. 400; 43 I. L. T. 72—Div. Ct., Ireland.

## III. PROCEDURE.

**10. Irregularity in Form of Summons—Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 2—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 10.**—When a summons is issued under the Cruelty to Animals Act, 1849, the justices cannot decline to proceed simply because the summons is irregular in form. They should hear the evidence, and, when they have done so, they should then make up their minds as to what offence under the summons has been proved.

**JOHNSON v. NEEDHAM**, [1909] 1 K. B. 626; 78 [L. J. K. B. 412; 100 L. T. 493; 73 J. P. 117; 25 T. L. R. 245—Div. Ct.

**11. Offence Punishable with more than Three Months' Imprisonment—Not Apparent on Face of Information—Right to Trial by Jury—Omission by Justices to Give Statutory Warning—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17.**—Where a person is charged before the magistrates at petty sessions with an offence in respect of which, on summary conviction, he may be imprisoned for a term exceeding three months, such person is entitled to claim to be tried by a jury. Justices are not bound, before the charge is gone into, to warn the accused as to his right to elect, unless it appear upon the face of the information, that the offence charged is punishable with more than three months' imprisonment, but when, during the hearing of the case, evidence is given which makes the charge become such an offence, it at once becomes the duty of the justices to give the statutory warning.

**R. v. BEESBY AND ANOTHER, JUSTICES, ETC., [AND DUGDALE, RECORDER OF BIRMINGHAM]**, [1909] 1 K. B. 849; 78 L. J. K. B. 482; 100 L. T. 486; 73 J. P. 234; 25 T. L. R. 337; 53 Sol. Jo. 289—Div. Ct.

**12. Illness of Magistrate in Course of Proceedings—Re-hearing before Different Magistrate—Evidence—Reading over Depositions.**—In the course of proceedings against certain defendants for conspiracy, in which a number of sittings had been held and a large number of witnesses had been examined, the magistrate before whom the proceedings were pending broke down in health, so that it became impossible for him to continue the hearing. Another magistrate sat to take the hearing, and he proposed that the witnesses who had already been examined

should be recalled and their depositions read over to them, and that they should be allowed to correct the depositions where they were wrong, with liberty to counsel for the prosecution and for the defence further to examine and cross-examine those witnesses. The defendants objected to this course, and claimed that the witnesses should be examined and cross-examined *de novo*.

**HELD**—that there was nothing in law to prevent the magistrate taking the course he proposed; and that he should exercise his discretion as to allowing, in any particular case, any witness to be examined in a particular way, or as to postponing the reading of any witness's cross-examination till he should be interrogated in the first instance on passages in his former evidence.

**EX PARTE BOTTOMLEY AND OTHERS**, [1909] 2 [K. B. 14; 78 L. J. K. B. 517; 100 L. T. 782; 73 J. P. 246; 25 T. L. R. 371—Div. Ct.

**13. Criminal Proceedings—Preliminary Examination Before Justices—Witnesses for the Defence.**—On the initial stage of criminal proceedings before justices, witnesses for the defence should be encouraged to give their evidence.

**R. v. NICHOLSON**, 73 J. P. 347—C. C. A.

**14. One Summons Charging Cruelty to Four Animals—Four Convictions—Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92).**—The defendant was charged in one summons under the Cruelty to Animals Act, 1849, with cruelly ill-treating four ponies by having between March 20th and April 6th, 1909, supplied them with unsuitable food. He was not informed when he appeared that he had to answer more than one charge, nor did he know till the justices, after having heard the case, returned into Court that he was to be convicted of more than one offence. The justices having convicted the defendant of an offence in respect of each of the four ponies, and imposed a fine in respect of each:

**HELD**—that three of the convictions must be quashed.

**R. v. RAWSON**, [1909] 2 K. B. 748; 101 L. T. [463; *sub nom.* **R. v. TRAFFORD-RAWSON, ETC.**; 78 L. J. K. B. 1156; 73 J. P. 483; *sub nom.* **R. v. TRAFFORD-LAWSON AND OTHERS, JUSTICES**, 25 T. L. R. 785—Div. Ct.

**15. Bias—Record of Previous Conviction.**—In this case a rule had been granted for *certiorari* to bring up and quash a conviction for exceeding the speed limit under sect. 9 of the Motor Car Act, 1903, on the ground that the justices showed bias. The applicant had stated in his affidavit that during the hearing of the summons two of the justices had open before them a book containing a record of the applicant's previous convictions. The applicant stated that those two justices showed a considerable amount of animation and feeling, repeatedly interrupting the proceedings with remarks which showed that they were preoccupied with evidence not before the Court, and that they accused the applicant's solicitor of misleading the Court.

### III. Procedure—Continued.

On its appearing that at the hearing the applicant had given evidence of a previous conviction against him, stating that though on that occasion he had been driving a 30 horse-power engine (and not an 8 horse-power engine as on this occasion) the evidence against him was precisely the same, that he had driven his car 220 yards in fifteen seconds, *i.e.*, at thirty miles an hour, and that the justices were under the impression that the applicant's solicitor had denied a previous conviction, the rule was discharged.

R. v. SPARKS AND OTHERS, JUSTICES, 73 J. P. [485—Div. Ct.]

16. *Service of Summons—Reasonable Time between Service and Hearing—Question of Fact—Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), ss. 1, 2.*—On April 30th a constable told C., who was a chauffeur, that he would be summoned for driving a motor car contrary to sect. 1 of the Motor Car Act, 1903, on that date. On May 2nd C. left his lodgings at Newtown, taking his motor car to Coventry on his master's business. Before leaving he told his landlady to take in the summons if it came for him. On May 4th, the summons, returnable on May 7th, was left with his landlady, and on May 7th he was convicted in his absence and without his knowledge of an offence under sect. 1 of the Motor Car Act, 1903. On May 9th C. returned to Newtown. It appeared that the justices were under the impression that the summons had actually reached C.

The Court made absolute a rule for *certiorari* to bring up and quash the conviction on the ground that if the justices had known that the summons did not reach C. they might well have formed a different conclusion as to whether there had been a reasonable time between the service and the hearing of the summons.

R. v. ANWYL AND OTHERS, JUSTICES, EX PARTE [COOKSON, 73 J. P. 485—Div. Ct.]

17. *Bias—Form of Order—Omission of Words "Without Hard Labour"—Ordering Imprisonment as Alternative without adding "if Fine not Sooner Paid"—Discretion in Granting Certiorari.*—The King's Bench Division in Ireland will not grant a *certiorari* to bring up and quash a decision of the justices on the ground of bias unless there is some reasonable evidence of a real likelihood of bias; a mere probability of bias is not sufficient.

In an order directing imprisonment in default of payment of a fine, it is not necessary to say such imprisonment is "without hard labour," as this is implied by omitting such words.

Where justices have ordered imprisonment in default of payment of a fine, and have omitted to include the words "unless such fine be sooner paid," the Court will exercise their discretion on an application for a *certiorari* to quash such order because of such omission, and will take into consideration all the circumstances of the case.

R. (TAVENER) v. JUSTICES OF TYRONE, 43 [1, L. T. 262—Div. Ct., Ireland,

18. *Absence of Members of Court during Part of Case—Decision—Validity.*—Certain members of a Court hearing licensing appeals were absent during a considerable portion of a case, but took part in its decision.

HELD—that the decision was thereby rendered null, and that it could not be validated by deducting the votes of the disqualified members.

GOODALL v. BILSLAND AND OTHERS, [1909] [S. C. 1152; 46 Sc. L. R. 555—Ct. of Sess.]

### IV. APPEALS.

#### (a) To Quarter Sessions.

See also POOR LAW, No. 11.

19. *Costs—Practice—No Appearance by Respondent—Discretion of Justices—Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), s. 5.*—The Court will not interfere with the discretion of Quarter Sessions in refusing to award costs to a successful appellant under sect. 5 of the Quarter Sessions Act, 1849, if that discretion has been exercised judicially.

R. v. NOTTINGHAMSHIRE JUSTICES, EX PARTE [PITNEY, 73 J. P. 183—Div. Ct.]

20. *Practice on Appeal—Respite—Waiver of Preliminary Objections.*—If respondents to an appeal at Quarter Sessions apply for a respite, they do not thereby waive their right to take certain preliminary objections which go to the root of the Court's jurisdiction to hear the appeal.

So held as to an objection that in a rating appeal there had been no sufficient complaint to the assessment committee prior to the notice of appeal.

Decision of Div. Ct. (77 L. J. K. B. 816; 98 L. T. 647; 72 J. P. 365; 6 L. G. R. 817) reversed on this point.

RHONDDA VALLEY BREWERIES CO. v. PONTY-PRIDD UNION ASSESSMENT COMMITTEE, [1909] 1 K. B. 652; 78 L. J. K. B. 432; 100 L. T. 587; 73 J. P. 177; 53 Sol. Jo. 242; 7 L. G. R. 428—C. A.

#### (b) By Special Case.

21. *Notice of Appeal—Form.*—The notice of appeal from the decision of a court of summary jurisdiction by way of case stated need not state on the face of it that the appellant is going on with the appeal.

Form given in Short and Mellor's Crown Office Practice (2nd ed., p. 628) and Oke's Magisterial Formulist (8th ed., p. 53) approved.

PROVINCIAL MOTOR CAB CO. v. DUNNING, [1909] 2 K. B. 599; 78 L. J. K. B. 822; 101 L. T. 231; 73 J. P. 387; 25 T. L. R. 646; 7 L. G. R. 765—Div. Ct.

22. *Practice—Form of Case Stated—Facts Found—Evidence—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2.*—Cases stated by justices must set forth the facts found, and not merely the evidence. In future the Court will send back, without allowing costs, cases in which

V. Appeals—Continued.  
the evidence is set out instead of the facts being found.  
STAR TEA CO. v. NEALE, [1909] W. N. 200—(C. A.

23. Case Stated—Disappearance of Defendant—Impossibility of Service—Jurisdiction of King's Bench to Hear Case Stated in Absence of Service—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 2.]—Magistrates dismissed a summons and at the request of the plaintiff stated a case for the opinion of the King's Bench Division. The defendant immediately afterwards disappeared, and it became impossible to serve him with notice of appeal and copy of case stated as provided in sect. 2 of the Summary Jurisdiction Act, 1857, but these documents were served on the solicitor who had appeared for him before the magistrates.

HELD—that where the non-service of notice of appeal and copy of case stated on defendant personally is due to the defendant's own act in leaving the country, a service of these documents on the solicitor who appeared for him at petty sessions will, in the circumstances, be sufficient, and that the King's Bench Division has jurisdiction to hear and adjudicate on such case stated.

CLARKE v. MCGUIRE, [1909] 2 I. R. 681; 43 [I. L. T. 52—Div. Ct., Ireland.

V. ACTIONS AGAINST MAGISTRATES.  
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MAIN ROADS.

See HIGHWAYS.

MAINTENANCE.

See ACTION; BASTARDY; HUSBAND AND WIFE; LUNATICS; POOR LAW; WILLS.

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MANDAMUS.

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MANSLAUGHTER.

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MARGARINE.

See FOOD AND DRUGS.

MARINE INSURANCE.

See INSURANCE.

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I. IN GENERAL.

1. Market Not Limited by Metes and Bounds—Extent—New Streets Made under Statutory Authority—Dedication—Market Rights—Metropolis Improvement (Additional Thoroughfares) Act, 1840 (3 & 4 Vict. c. 87), s. 20—Whitechapel and Holborn Improvement Act, 1865 (28 & 29 Vict. c. iii.), s. 16.]—An ancient manor market for hay and straw, which was without metes and bounds, was held in the parish of Whitechapel. The market was



**I. In General**—*Continued.*

held in High Street, and for many years the market carts had stood in some of the adjoining streets when High Street was overcrowded. In 1840 and 1865 two statutes were passed authorising a public body to make three new streets running into High Street, and both those statutes provided that all the land which should be laid open into the streets should form part of the streets and should be used by the public accordingly. One of the new streets was a widening and extension of an old street which adjoined High Street, and the others were either in whole or in part new streets constructed on land which had before then been private property. Since the new streets were made carts attending the market were placed therein. In an action by hay and straw salesmen for a declaration of their right to use the new streets adjoining High Street for the purposes of the market:—

**HELD**—that it was the right of every salesman to be in the adjoining streets, subject to the orders of the proper authority, when High Street was full.

Decision of C. A. (77 L. J. K. B. 347; 97 L. T. 599; 71 J. P. 486; 23 T. L. R. 759; 24 T. L. R. 148; 6 L. G. R. 180; [1908] 1 K. B. 115) affirmed.

**MAYOR, ETC., OF STEPNEY v. GINGELL, SON AND [FOSKETT, LD., [1909] A. C. 245; 78 L. J. K. B. 673; 100 L. T. 629; 73 J. P. 273; 25 T. L. R. 411; 53 Sol. Jo. 356; 7 L. G. R. 613**  
—H. L.

**II. TOLLS.**

**2. Sale of Coal Outside Market—Necessity for Licence—Interpretation of Local Act—Bradford Corporation Act, 1866 (29 & 30 Vict. c. cxxii.), ss. 41, 44, and Sched. B.]**—The respondent was summoned for exposing coal for sale in a road in a borough without licence from the corporation. A local Act imposed a penalty on any person exposing for sale from door to door without a licence any article in respect of the sale of which in any market a toll was authorised. The Act authorised the corporation to take a toll (*inter alia*) as follows:—"Hay and straw. For every cartload of hay straw grass vetches or other article commodity or thing exposed for public sale if drawn by one horse or other beast, per day 4d."

**HELD**—that coal was not included in the general words "other article commodity or thing," and that therefore the respondent had committed no offence.

**JOHNSON v. ATKINSON**, 101 L. T. 637; 73 J. P. 510; 7 L. G. R. 1134—Div. Ct.

**III. HAWKERS.**

[No paragraphs in this vol. of the Digest.]

**MARRIAGE.**

*See* HUSBAND AND WIFE.

**MARRIAGE, PROOF OF.**

*See* EVIDENCE; HUSBAND AND WIFE.

**MARRIAGE SETTLEMENTS.**

*See* CONFLICT OF LAWS; SETTLEMENTS.

**MARRIED WOMAN.**

*See* BANKRUPTCY AND INSOLVENCY; HUSBAND AND WIFE.

**MARSHALLING ASSETS AND SECURITIES.**

*See* BANKRUPTCY AND INSOLVENCY; EXECUTORS AND ADMINISTRATORS.

**MARTIAL LAW.**

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**MASTER AND SERVANT.****I. LIABILITY OF MASTER FOR INJURY TO SERVANT.****1. Under Workmen's Compensation Acts, 1897—1906.**

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See also AGENCY: CRIMINAL LAW. No. 45; EDUCATION, No. 11.

**I. LIABILITY OF MASTER FOR INJURY TO SERVANT.****1. *Under Workmen's Compensation Acts, 1897—1906.***

See also SHIPPING, No. 33.

**(a) Accident.**

See also I., 1 (k), and No. 93, *infra*.

**1. Accident Happening Abroad—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), ss. 1, 7.]—A fitter in the employment of the appellant company was sent by them to Malta to work for them in the construction of a breakwater. While in Malta he was fatally injured by an accident arising out of, and in the course of, his employment. His widow claimed compensation under the Workmen's Compensation Act, 1906.

**HELD**—that the claimant was not entitled to claim compensation, inasmuch as the deceased workman did not come within the limited class of persons to whom the Workmen's Compensation Act, 1906, applies in the case of accidents happening outside the United Kingdom.

**TOMALIN v. PEARSON AND SON, LD.**, [1909] 2 [K. B. 61; 78 L. J. K. B. 863; 100 L. T. 685; 25 T. L. R. 477—C. A.]

**2. Illness Resulting from Accident—Proper Test of Liability—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.]—The applicant, while employed in the respondents' colliery, was injured by a stone falling on his knee. It was a cold day, and the applicant could only get home slowly and with difficulty. Chest trouble and pneumonia supervened, and in an application for compensation medical evidence was given that the applicant suffered from bronchitis and chronic asthma and was unable to work. The county court judge found that the applicant's condition was not the natural result of the accident.

**HELD**—that the test was not whether the applicant's condition was a natural result of the accident, but whether it was a result of the accident in the sense that it was occasioned by the applicant's debilitated condition immediately after the accident.

**YSTRADOWEN COLLIERY CO. v. GRIFFITHS**, [1909] 2 K. B. 533; 78 L. J. K. B. 1044; 100 L. T. 869; 25 T. L. R. 622—C. A.]

**3. Sunstroke—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.]—The applicant, an ordinary seaman, while engaged in painting the vessel when she was lying at a port on the coast of Mexico, was incapacitated by sunstroke.

**HELD**—that his injury arose by accident within the meaning of the Workmen's Com-

### I. Liability of Master for Injury to Servant—*Continued.*

pensation Act, 1906, and that he was entitled to compensation.

MORGAN v. OWNERS OF STEAMSHIP ZENAIDA, [25 T. L. R. 446—C. A.]

4. *Strain—Condition of Workman—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 1.]—A workman while engaged in tightening a nut with a spanner strained himself and thereby ruptured an aneurism of the aorta, which caused his death. A *post-mortem* examination showed that the aneurism was in such an advanced condition that it might have burst while the man was asleep, and that very slight exertion or strain would be sufficient to bring about a rupture.

HELD—that the workman's death resulted from an injury by accident within the meaning of the Workmen's Compensation Act, 1906.

HUGHES v. CLOVER CLAYTON & Co., [1909] 2 K. B. 798; 78 L. J. K. B. 1057; 101 L. T. 475; 25 T. L. R. 760; 53 Sol. Jo. 763—C. A.]

5. *Cardiac Breakdown Due to Overwork—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 1, *sub-s.* 1.]—A miner while engaged in letting full hutches down a steep gradient by hand felt a sudden pain in his chest and sat down saying he thought he had jerked himself. A few days afterwards he became totally incapacitated. In an application under the Act the arbiter found in fact that the cause of the incapacity was cardiac breakdown due to the fact that the work in which he had for some days been engaged was too heavy for him; that he was not injured by any sudden jerk, but that the repeated excessive exertion strained his heart until finally it was overstrained.

HELD—that the injury was not an accident within the meaning of the Act.

COE v. FIFE COAL CO., LD., [1909] S. C. 393; [46 Sc. L. R. 328—Ct. of Sess.]

#### (b) Alternative Remedies.

6. *Claim by Workman Refused by Arbitrator on Ground of Serious and Wilful Misconduct—Subsequent Action of Damages against Employers at Common Law—Workmen's Compensation Act, 1897* (60 & 61 Vict. c. 37), s. 1, *sub-s.* 2 (b).]—A claim for compensation for accidental injuries brought by a miner against his employers under the Workmen's Compensation Act, 1897, was refused by the arbitrator on the ground that the miner had been guilty of serious and wilful misconduct; thereafter he brought an action at common law against his employers for damages for personal injuries sustained in the accident.

HELD—that having elected to claim compensation under the Act, and having obtained a final judgment upon that claim, he was barred by the provisions of sect. 2 (b) from suing an action of damages at common law.

Cribb v. Kynoch, LD. (No. 2) ([1908] 2 K. B. 551—C. A.), approved.

BURTON v. CHAPEL COAL CO., LD., [1909] S. C. [430; 46 Sc. L. R. 375—Ct. of Sess.]

7. *Res judicata—Arbitration under Workmen's Compensation Act, 1897* (60 & 61 Vict. c. 37)—*Common Law Action for Damages.*]—Opinions (per Lords Kinnear and McLaren) that the decision of an arbitrator upon a question of fact in an arbitration under the Workmen's Compensation Act, 1897, was not *res judicata* in a subsequent common law action of damages by the workman against his employers, the arbitration being a proceeding for indemnification irrespective of contract or fault, whereas the action was a proceeding based on fault or negligence.

BURTON v. CHAPEL COAL CO., LD., [1909] S. C. [430; 46 Sc. L. R. 375—Ct. of Sess.]

8. *Discontinuance of Weekly Payment—Common Law Action—Acquiescence—Election—Workmen's Compensation Act, 1897* (60 & 61 Vict. c. 37), *Sched. I.* (1) (b).]—An injured workman received a weekly payment of compensation under the Workmen's Compensation Act, 1897, for about six months after the accident, when the payments were discontinued. The workman then brought a common law action against his employer for damages in respect of his injury, which action was dismissed on the ground that the workman had elected to take compensation under the Act. Thereafter a memorandum of agreement under the Act was recorded and the workman claimed compensation from the date when the payments were discontinued.

HELD—that the workman had acquiesced in the discontinuance of the weekly payments during the subsistence of the common law action, and that he was therefore barred from claiming compensation for the period prior to the recording of the agreement.

ROSIE v. MACKAY, 46 Sc. L. R. 999—Ct. of Sess.]

9. *Action at Common Law and under Employers' Liability Act, 1880* (43 & 44 Vict. c. 42)—*Tender of Sum Due under Workmen's Compensation Act, 1897* (60 & 61 Vict. c. 37)—*Absolutor at Common Law—Decree under Employers' Liability Act, 1880, for Sum Tendered—Costs.*]—In an action by the widow and children of a miner against his employers for reparation at common law, and alternatively for a certain sum under the Employers' Liability Act, 1880, the defenders repudiated liability but tendered the sum claimed under the Act as the amount to which the pursuers were entitled under the Workmen's Compensation Act, 1897. The tender was refused. The defenders were assailed at common law and found liable under the Employers' Liability Act, 1880, to the pursuers in the sum tendered.

HELD—that the pursuers were liable in expenses.

BLACK v. FIFE COAL CO., [1909] S. C. 152; [46 Sc. L. R. 191—Ct. of Sess.]

#### (c) Ancillary or Incidental Work.

See I., 1 (q), *infra*.



# I. Liability of Master for Injury to Servant— *Continued.*

## (d) Assessment of Compensation.

### (1) *Difference in Wages or Earning Capacity.*

**10. Diminution in Earnings owing to General Fall in Wages—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I. (2).—**A workman, who in the course of his employment met with an accident necessitating the amputation of his right hand, subsequently accepted employment in a different capacity receiving the same wages as he had earned before the accident. Some time after his wages were reduced owing to a general fall in wages, and he proceeded to claim compensation.

**HELD**—that as the change in his wages was not attributable to any change in the workman's capacity to earn wages he was not entitled to compensation.

**BLACK v. MERRY AND CUNINGHAME, LD.,** [1909] S. C. 1150; 46 Sc. L. R. 812—Ct. of Sess.

### (2) *Extras, Deductions, and Apportionment.*

**11. Seaman—Wages Paid to Injured Seaman between Date of Accident and Discharge at Return Port—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 7, Sched. I. (3).—**In fixing the amount of the weekly payments under Sched. I. (3) of the Workmen's Compensation Act, 1906, to a seaman who has been injured in the course of his employment, regard must be had by the arbitrator to any payments of wages made to the seaman after the accident but before he is brought home. The period of incapacity referred to is not limited to the period during which the employer is liable to pay compensation.

**MCDERMOTT v. OWNERS OF STEAMSHIP TINTORETTO, [1909] 2 K. B. 704; 78 L. J. K. B. 1144; 101 L. T. 90; 25 T. L. R. 691; 53 Sol. Jo. 650—C. A.**

**12. Compensation from Distress Committee—Relief Received from Poor Law Authorities during Incapacity—Set-off—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (3).—**A workman who was engaged by a distress committee under the Unemployed Workmen Act, 1905, received injuries which totally incapacitated him from work. During his incapacity he received poor relief at the rate of 10s. per week. It was held that the amount received by him in poor law relief did not fall to be computed in discharge of the compensation to which he was found entitled under the Workmen's Compensation Act, 1906, from the distress committee.

**GILROY v. MACKIE, [1909] S. C. 466; 46 Sc. [L. R. 325—Ct. of Sess.]**

**13. Average Weekly Earnings—Deductions from Wages—Special Expenses—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., 2 (d).—**A miner was killed by accident arising out of and in the course of his employment. He employed a drawer whom he himself paid out of his wages. The deceased

had been accustomed to purchase explosives for his work from his employers, and the price of these they deducted in paying his wages.

**HELD**—that in determining the average weekly earnings of the deceased there should be deducted from his gross wages the amount of wages paid by him to his drawer, but not the sums retained by his employers as the cost of the explosives.

**Abram Coal Co. v. Southern** ([1903] A. C. 306), and **Midland Ry. v. Sharpe** ([1904] A. C. 349) followed.

**McKEE v. STEIN & Co., LD., 47 Sc. L. R. 39—**[Ct. of Sess.]

**14. Three Years' Continuous Employment—Death by Accident—Three Years' Earnings—Concurrent Employment—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (a) (i).—**The amount of compensation payable to the dependants of a deceased workman who at the date of the injury had been continuously for three years in the employment of the same employer is the amount of the workman's earnings in that employment during those three years, and regard cannot be had to the workman's earnings in any concurrent employment during that period.

**BUSBY v. LONDON AND INDIA DOCKS, 126 L. T. [Jo. 521—C. A.]**

### (3) *Length and Continuity of Employment.*

**15. "Average Weekly Earnings"—Stoppages—Bank and other Holidays—Absence from Illness—Mode of Computation—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (1) (2).—**A collier was injured in the course of his employment. For the twelve months preceding the date of his accident his total earnings amounted to £68. During the twelve months there were fourteen weeks of stoppage, when the applicant could not get work; two weeks of Bank holidays and wakes, when he did not work; two weeks when he was away owing to illness; and one week when he took a holiday; so that he only worked thirty-three weeks. The fourteen weeks of stoppage and two weeks of Bank holidays and wakes were normal and recognised incidents of the applicant's work. In calculating the applicant's average weekly earnings during the twelve months before the accident the county court judge first divided the total earnings—£68—by 33, and then took  $\frac{2}{3}$  of the result in order to arrive at the true average for each week in the working year.

**HELD**—that this mode of calculating the average weekly earnings was right.

**Decision of C. A. ([1909] 1 K. B. 352; 78 L. J. K. B. 154; 99 L. T. 901; 25 T. L. R. 167; 35 Sol. Jo. 132) affirmed.**

**ANSLOW v. CANNOCK CHASE COLLIERY CO., [LD., [1909] A. C. 435; 78 L. J. K. B. 679; 100 L. T. 786; 25 T. L. R. 570; 53 Sol. Jo. 519—H. L.]**

### (4) *General.*

**16. Partial Dependency—Poor Law Relief Taken into Account—Annuity as Basis of Calculation of Compensation Considered—Workmen's**

# I. Liability of Master for Injury to Servant— (Continued.)

*Compensation Act, 1906* (6 Edw. 7, c. 58).—Where it was shown that an applicant for an award under the Workmen's Compensation Act, 1906, was in receipt of parish relief from the guardians, it was

**HELD**—that such source of means and income must be taken into account in fixing the amount of compensation to be awarded.

**FURTHER HELD**—that the adoption of the cost of an annuity as a basis of calculation of compensation was erroneous, and not provided for in the Act.

**BYLES v. POOL**, 73 J. P. 104; 53 Sol. Jo. 215—  
[County Court.]

**17. Incapacity—Award of Lump Sum—Competency—Workmen's Compensation Act, 1897** (60 & 61 Vict. c. 37). *Sched. I. (1) (b)*.—In arbitration proceedings raised after incapacity has ceased, it is incompetent to award a lump sum.

**DEMPSTER v. W. BAIRD & Co., LD.**, [1909] S. C. 127; 46 Sc. L. R. 119—Ct. of Sess.

## (e) Commencement of Proceedings: Claim, Notice, Dispute.

*See also Nos. 92, 95, infra.*

**18. Notice of Accident—Notice in Writing—Informality—Employers not Prejudiced—Burden of Proof—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), ss. 1, 2, *sub-s. 1 (a)*.—The notice of accident under sect. 2 of the Workmen's Compensation Act, 1906, must be in writing. The burden is on the applicant to prove that the employers have not been prejudiced by the absence or informality of any such notice.

**Keen v. Milwall Dock Co.** ((1882) 8 Q. B. D. 482—C. A.) applied.

**HUGHES v. COED TALON COLLIERY CO. LD.**, [1909] 1 K. B. 957; 78 L. J. K. B. 539; 100 L. T. 555—C. A.

**19. Personal Bar—Partial Incapacity—Acceptance by Workman of Less Remunerative Employment under Same Employers—Subsequent Claim of Compensation—Workmen's Compensation Act, 1897** (60 & 61 Vict. c. 37).—A workman who had sustained injury by accident on 1st March, 1899, received, in virtue of an unrecorded agreement, compensation at the maximum rate under the Workmen's Compensation Act, 1897, till 21st May, 1900, when he accepted employment from the same employers less remunerative than formerly but giving more than the compensation, and he remained therein till 1st April, 1907. During that time he, on various occasions, requested his employers to make up to him the deficiency in his weekly earnings, but his requests were not complied with.

**HELD**—that the workman was barred from claiming compensation in respect of the period

during which he was receiving wages without reservation.

**DEMPSTER v. W. BAIRD & Co., LD.**, [1909] S. C. 127; 46 Sc. L. R. 119—Ct. of Sess.

**20. Seaman—Ship Lost with All Hands—Application for Compensation Before the Lapse of Twelve Months—Merchant Shipping Act, 1894** (57 & 58 Vict. c. 60), s. 171, *sub-s. 2*; *Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 7, *sub-s. 1 (g)*.—On a claim for compensation under sect. 7 of the Workmen's Compensation Act, 1906, in respect of the death of a seaman, the proceedings are regulated by the provisions of the Workmen's Compensation Acts and not by the provisions applicable to the recovery of wages under sect. 174, *sub-ss. 2, 3* of the Merchant Shipping Act, 1894, which latter provisions are incorporated in the Act of 1906 for the purpose of facilitating seamen in making their claims.

The lapse of twelve months during which a ship has not been heard of (after which, under sect. 174 of the Merchant Shipping Act, 1894) she is deemed to have been lost with all hands, is not a condition precedent to a claim for compensation under the Workmen's Compensation Act.

Accordingly, where by the ordinary rules of evidence, a seaman would be deemed to have been lost at sea with his ship, an application for compensation may be made, notwithstanding that twelve months have not elapsed from the time when the ship was last heard of.

**MAGINN v. CARLINGFORD LOUGH STEAMSHIP CO., LD.**, 43 I. L. T. 123—C. A., Ireland.

## (f) Dependants.

**21. Death of Dependant before Claim Made—Claim by Dependant's Executrix—Admissibility of Claim—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1, *sub-ss. 1, 2*, *Sched. I., s. 1, sub-s. (a) (1)*.—The right of a dependant of a workman, who has died from injury received in the course of his employment, to compensation arises on the death of the workman, and therefore at his death there exists a vested right in the dependant or dependants to a sum of money defined by statute to be paid by the employer, the right to claim which passes to the legal representatives of a dependant on his death, notwithstanding that the dependant has died without having made any claim.

**UNITED COLLIERIES, LD. v. SIMPSON (OR HENDRY)**, [1909] A. C. 383; 78 L. J. P. C. 129; 101 L. T. 129; 25 T. L. R. 678; 53 Sol. Jo. 630; [1909] S. C. (H. L.) 19; 46 Sc. L. R. 780—H. L.

**22. Illegitimate Child—Claim by Mother and her Husband—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 13].—A boy, who was illegitimate, was killed by an accident arising out of and in the course of his employment. In an application for compensation under the Workmen's Compensation Act, 1906, by the boy's mother and her husband (who was not the putative father of the boy) the county court judge



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found that the boy lived with the applicants, that both he and the male applicant paid their wages to the female applicant, and from this common fund the family, including the boy, were maintained, and that there was a margin of profit, the boy's wages being in excess of the cost of his maintenance. The county court judge thereupon made an award in favour of both applicants. The employers appealed.

HELD—allowing the appeal (1) that the male applicant did not come within the class of "dependants" mentioned in sect. 13 of the Workmen's Compensation Act, 1906, and (2) (Buckley, L.J., dissenting) that as the female applicant was wholly dependent upon her husband's earnings she was not in fact partially dependent upon the earnings of the deceased.

McLEAN AND WIFE v. MOSS, RAY IRON AND STEEL CO., LD., 1909, 2 K. B. 521; 78 L. J. K. B. 849; 100 L. T. 871; 25 T. L. R. 633—C. A.

23. *Posthumous Illegitimate Child*—*W. L. Ross's Compensation*. 47, 1906 (6 Edw. 7, s. 58), s. 1, 13.]—A collier who was just about to marry a woman whom he was pregnant by him was killed by an accident in the mine.

HELD—that the child born subsequently was a "dependant."

HOBSON v. C. A., 1909, 1 K. B. 178; 78 L. J. K. B. 150; 100 L. T. 194; 25 T. L. R. 106; 53 Sol. Jo. 117—affirmed.

ORRELL COLLIERY CO., LD. v. SCHOFFIELD, 1909, A. C. 433; 78 L. J. K. B. 677; 100 L. T. 786; 25 T. L. R. 569; 53 Sol. Jo. 518—H. L.

24. *Husband and Sons Killed*—*Earnings of Sons Contributed to Common Fund of Household*—*Wife's Part of Dependents Household*—*Workmen's Compensation Act, 1906* (6 Edw. 7, s. 58), s. 13.]—A father and two sons were employed at the colliery. The sons lived with their parents, to whom they gave all their earnings, and those earnings, together with the father's, formed one common fund out of which the whole household was maintained. By an accident at the colliery, the father and both sons were killed. The widow, on behalf of herself and the younger children, claimed compensation under the Workmen's Compensation Act, 1906, in respect of the death of the father and the two sons. The county court judge held that the applicants were wholly dependent on the father, and he made his award on that footing.

HELD—that the county court judge was right in so holding.

Per Farwell, L.J.—If it were proved in such a case that the earnings of the father were wholly inadequate and did not in fact maintain his family, different considerations would arise.

*McLean and Wife v. Moss, Ray Iron and Steel Co., Ltd.* (*supra*) applied.

HUBSON v. OWNERS OF WEST STANLEY COLLIERY, 78 L. J. K. B. 1060; *sub nom.* HOBSON v. HD., 100 L. T. 431; 25 T. L. R. 758; 53 Sol. Jo. 732—C. A.

25. *Question of Fact—Dependant Child*—*V. Moss's Illegitimate Child*—*Workmen's Compensation Act, 1906* (6 Edw. 7, s. 58), s. 13.]—An action of an illegitimate child obtained in an action of filiation and aliment decree for £6 6s. annually for ten years against the father. He, by changing his name, evaded payment for some time, but finally the mother found him and arrested a sum of £2 in his employer's hands. She did not proceed with a forthcoming, but the father agreed that the money should be uplifted for behoof of the child. Thereafter the father, the money never having been uplifted, died from injuries sustained in the course of his employment. No other money was contributed by the father to the child's support.

HELD—that whether a claimant is a "dependant" is a question of fact upon which the arbiter's decision is final, unless the case discloses that the decision of the question in fact has been determined by an error in law, and that here no such error appeared, it not being necessary to show that the money had been actually spent upon the child.

*Winn Colliery Co. v. Thomas* (1909) A. C. 528—H. L.) followed.

BOWHILL COAL CO. (FIELD, L.D. v. NATHAN 1909, S. C. 272; 46 S. L. R. 220—C. and Sess.,

26. *Labour Dependent*—*Agreement with Compensation between Employer and Labour Dependent*—*Prerogative Guardian ad litem*—*Proceedings under the Workmen's Compensation Act, 1906*, in respect of the death of a workman, were brought on behalf of A., a daughter, who had been residing with him and acting as his housekeeper, and B., his wife, who was then, and had been for many years, an inmate of the district lunatic asylum, and the matter was settled as between the employer and A., by the employer agreeing to pay £100, which was lodged in Court, and (no guardian *ad litem* to B. having been appointed) an application was made by the resident medical superintendent of the asylum of which B. was an inmate to have the said sum of £100 apportioned between A. and B. on the basis of both of them being dependants of the deceased.

HELD—on appeal, that, as neither the employer nor B., the lunatic (no guardian *ad litem* having been appointed), was before the Court, there was no jurisdiction to make any order, and the Court accordingly made no rule.

KERR AND ANOTHER v. STEWART, 43 I. L. T. 119 [—C. A., Ireland.

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27. *Agreement—Defective Point—Liability of Colliery Company for Injury Caused to the Person of Parties not under Contract to them through Defective Wagon*—*Workmen's Compensation Act, 1906* (6 Edw. 7, s. 58), s. 6.]—A colliery company contracted with a railway company for the carriage of coals to a vessel at G., to be delivered alongside the vessel. The coals were conveyed in waggons hired for the purposes of the colliery from a firm of wagon builders. At the



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docks, which belonged to the railway company, the waggons were taken over by a firm of stevedores for the purpose of loading the ship, under a contract between them and the railway company. To load the ship the waggons had to be run up a gradient on to a platform and there tipped. One of the stevedores' workmen, who was engaged in running a waggon down again to the railway lines, was injured through a defect in the brake of the waggon. The workman having recovered compensation under the Workmen's Compensation Act, 1906, from his employers, they claimed relief from the colliery company on the ground that it was in fault in supplying a defective waggon.

**HELD**—that, as the operation in which the workman was injured was outside the contract in which the colliery company was interested, there was no relation of duty on its part towards the injured workman, and that the colliery company must therefore be *assolviéd*.

**KEMP & DOUGALL v. DARNGAVIL COAL CO.**,  
[1909] S. C. 1314; 46 Sc. L. R. 939—  
Ct. of Sess.

## (h) Jurisdiction.

**28. Discharge Granted by Workman—Question as to Validity—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (3).**—A question as to the validity of discharge granted by the workman is a question "as to the liability to pay compensation" under sect. 1 (3) of the Act, and a sheriff sitting as arbiter can competently dispose of the same.

**ELLIS v. LOCHGELLY IRON AND COAL CO.**,  
[1909] S. C. 1278; 46 Sc. L. R. 960—  
Ct. of Sess.

## (i) Medical Examination.

**29. "Refuse to Submit"—Stipulation by Workman that his own Medical Practitioner should be Present at Examination—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1; Sched. I, s. (14).**—An injured workman, who was required by his employers to submit himself for examination by a duly qualified medical practitioner provided and paid by them, expressed his willingness to submit himself to such examination provided that his own medical practitioner was allowed to be present thereat.

**HELD**—that he had not "refused to submit" within the meaning of the Act.

**DEVITT v. OWNERS OF STEAMSHIP BAINBRIDGE**,  
[1909] 2 K. B. 802; 78 L. J. K. B. 1059;  
101 L. T. 299—C. A.

**30. Medical Referee—Certificate that Incapacity has Caused—Weekly Payments Stopped—Supervening Incapacity—Application for Arbitration—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I, (15).**—Where a medical referee certifies that a workman's incapacity has ceased and the workman acquiesces in the stopping of weekly payments, but the employers do not apply for the compensation ended on a review, the workman is not barred

by the medical referee's certificate from subsequently applying for arbitration as to compensation on the ground of supervening incapacity.

**UNITED COLLIERIES, LD. v. KING**, 47 Sc. L. R.  
[41—Ct. of Sess.]

## (j) On, In, or About.

### (1) Agriculture.

[No paragraphs in this vol. of the Digest.]

### (2) Buildings (Statutory).

#### (A) Construction and Repair.

[No paragraphs in this vol. of the Digest.]

#### (B) Exceeding 30 feet.

[No paragraphs in this vol. of the Digest.]

#### (C) Scaffolding.

[No paragraphs in this vol. of the Digest.]

### (3) Engineering Work.

[No paragraphs in this vol. of the Digest.]

#### (4) Factory.

##### (A) Dock, Wharf, Quay.

[No paragraphs in this vol. of the Digest.]

##### (B) Warehouse, Machinery, Plant, etc.

[No paragraphs in this vol. of the Digest.]

#### (5) Mine.

[No paragraphs in this vol. of the Digest.]

#### (6) Railway.

[No paragraphs in this vol. of the Digest.]

## (k) Out of and in the Course of Employment.

**31. Accident Caused by Cockchafer—Arising in the Course of but not out of Employment—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.**—A claimant for compensation under the Workmen's Compensation Act, 1906, must establish that the accident either arose out of something that he was doing in the course of his work, or that his work placed him in a position of peculiar danger. It is not enough for him to say that he would not have met with the accident if he had not been at work.

C., a ladies' maid and sewing maid, was one night sewing by electric light near an open window. A cockchafer flew into the room, and C., in throwing up her hand to prevent its flying in her face, struck her eye so violent a blow with the knuckle of her thumb as to cause ultimately permanent injury to her eye and the loss of her situation.

**HELD**—that the accident, the risk of which was in no way incidental to the employment, did not arise "out of" the employment.

**CRASKE v. WIGAN**, [1909] 2 K. B. 635; 78 L. J. K. B. 994; 101 L. T. 6; 25 T. L. R. 632; 53 Sol. Jo. 560—C. A.

**32. Bite of Cat—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.**—A workman was

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employed in a stable where a stable cat was kept. He was, in the course of his employment, taking his dinner in the stable when the cat sprang at him and bit him. The cat was not known to be vicious, nor was the workman teasing the cat.

HELD—that the accident arose out of and in the course of the workman's employment, and he was entitled to compensation.

ROWLAND *v.* WRIGHT, [1909] 1 K. B. 963; 77 [L. J. K. B. 1071; 99 L. T. 758; 24 T. L. R. 852—C. A.]

**33. Injury from Child's Ball—Thrown in Play by Fellow Servant—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1 (1).—A domestic servant while engaged in the performance of her duty was struck on the eye by a child's ball playfully thrown at her by a fellow-servant, the child's nurse, with the result that she almost completely lost the sight of the eye.

HELD—that the accident was not an accident arising out of the employment within the meaning of sect. 1 (1) of the Workmen's Compensation Act, 1906.

WILSON *v.* LAING, [1909] S. C. 1230; 46 Sc. [L. R. 843—Ct. of Sess.]

**34. Tortious Act of Third Party—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1 (1).—Where the applicant was employed as cook at an hotel in which the kitchen and the bar were on the same level, and a customer came out of the bar into the kitchen, where he had no business to be, and made a rush at the cook, who, in trying to avoid him, put her arm through a glass door and was seriously injured.

HELD—that this was not an accident arising "out of" the employment.

MURPHY *v.* BERWICK, 43 I. L. T. 126—C. A., [Ireland.]

**35. Girl Drying her Hair at Fire—Also in Charge of Cradle—Clothes Catching Fire—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.—A domestic servant who was outside the door of her employer's house drying her hair returned, in response to an order, to the house to take charge of a baby in a cradle within a couple of feet of the fire. She continued whilst so engaged the operation of drying her hair; her sleeve was loose and caught fire, and from the injuries received she died. No one witnessed the occurrence, but, according to a statement made by the girl herself after the happening of the accident, her clothes caught fire whilst she was drying her hair.

HELD—that the accident did not arise out of and as an incident of the employment.

CLIFFORD *v.* JOY, 43 I. L. T. 192—C. A., [Ireland.]

**36. Burden of Proof—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1, sub-s. 1.—A person who was employed as a donkeyman on board a ship was returning to the ship when he fell off the gangway and was killed. The

only evidence as to how the accident happened was the following entry in the log book:—"11.15, January 4, 1908. Thomas McDonald, donkeyman, whilst returning on board ship from the shore, more or less the worse for liquor, refused the aid of night watchman and policeman to assist him up the gangway, and on reaching the top step suddenly overbalanced and fell over the gangway mainropes, dropping between the ship and quay, and striking the iron girder before reaching the water." In proceedings by his widow for the assessment of compensation under the Workmen's Compensation Act, 1906:—

HELD—that the evidence was equally consistent with the deceased man having gone ashore either on ship's business, or upon his own business, or without leave; and that therefore the applicant for compensation had not discharged the *onus* upon her of proving that the accident arose out of and in the course of the employment, and was not entitled to compensation.

McDONALD *v.* OWNERS OF THE STEAMSHIP [BANANA], [1908] 2 K. B. 926; 78 L. J. K. B. 26; 99 L. T. 671; 24 T. L. R. 887; 52 Sol. Jo. 741—C. A.]

**37. Engine Driver Crossing Line for own Purposes—Workmen's Compensation Act, 1906** (60 & 61 Vict. c. 37), s. 1 (1).—An engine driver whose engine was taking in water walked across a siding to get from a friend on another engine a book unconnected with his duties. While walking back he was killed by a truck which was being shunted.

HELD—that the accident did not arise out of and in the course of his employment.

REED *v.* GREAT WESTERN RY. Co., [1909] [A. C. 31; 78 L. J. K. B. 31; 99 L. T. 781; 25 T. L. R. 36; 53 Sol. Jo. 31—H. L.]

**38. Workman Returning Home—Risk Incurred by Workman for His Own Pleasure—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.—A workman was walking home for dinner through his employers' docks, which were traversed by lines of rails, part of the line of a railway company. While still within his employers' premises the workman endeavoured to climb on to a waggon, one of a train of waggons travelling on the rails. In doing so he fell and received injuries resulting in serious and permanent disablement. The arbiter found in fact that the workman did not attempt to climb into the said waggon for any object of his employers, but for his own pleasure.

HELD—that the accident did not arise out of the employment.

MORRISON *v.* CLYDE NAVIGATION TRUSTEES, [1909] S. C. 59; 46 Sc. L. R. 40—Ct. of Sess.]

**39. Accident while on Way to Work—Accident on Premises of Employers—Duties not begun—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1 (1).—A miner, while proceeding to his work by the usual and recognised way, tripped and fell, sustaining injuries resulting in incapacity. The accident happened on premises

# **I. Liability of Master for Injury to Servant—** *Continued.*

belonging to the mine-owners at a point about 360 yards from a lamp cabin, where it was the miner's duty to obtain and examine his safety lamp preparatory to proceeding to the pit-head and commencing his work. The time of the accident was about twenty minutes before the time when the miner had to be down the pit.

HELD—that the accident did not arise out of and in the course of the claimant's employment.

ANDERSON *v.* FIFE COAL CO., LD., 47 Sc. L. R. [3—Ct. of Sess.

**40. Ship Lying in Harbour—Man Going Ashore for his Own Purposes—With or Without Leave—Falling between Quay-side and Vessel—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58).]**—M., a fireman on a steamship, arrived at New York, went ashore to buy personal necessities. On returning, not drunk but after drinking, he fell from the ladder connecting the quay-side with the ship and was drowned. By a local law in New York written passes given by the master or chief engineer of the vessel are needed to protect foreign sailors on shore from arrest. The county court judge was not satisfied that M. had such a pass, but found that his superior knew that he was going ashore, and that if he had no pass the reason was that his superior had omitted to give one to him.

HELD (Fletcher Moulton, L.J., dissenting)—that it was immaterial whether M. went ashore in breach of orders or by permission, that he was outside the Workmen's Compensation Act, 1906, from the moment he left the ship for his own purposes till he got back on to the ship, and that, as he had not actually returned on board the ship, the steamship company were not liable.

McDonald *v.* Owners of Steamship Banana (supra) followed.

Robertson *v.* Allan Bros. (77 L. J. K. B. 1072; 98 L. T. 821) distinguished.

MOORE *v.* MANCHESTER LINERS, LD., [1909] [1 K. B. 417; 78 L. J. K. B. 463; 100 L. T. 164; 25 T. L. R. 202—C. A.

**41. Burden of Proof—Unexplained Accident to Seaman—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.]**—An engineer on board a steamship left his berth one night saying that he would go on deck for a breath of fresh air. He was not seen again alive, and next day his dead body was found in the water close to the ship.

HELD—that from these facts the Court could not draw the inference that the accident arose out of the employment, and therefore that the deceased man's widow was not entitled to compensation under the Workmen's Compensation Act, 1906.

MARSHALL *v.* OWNERS OF STEAMSHIP WILD [ROSE, [1909] 2 K. B. 46; 78 L. J. K. B. 336; 100 L. T. 739; 25 T. L. R. 452; 53 Sol. Jo. 448—C. A.

**42. Evidence—Inference—Onus of Proof—Workmen's Compensation Act, 1906 (6 Edw. 7,**

c. 58), s. 1 (1).]—The chief cook and baker on board a steamship disappeared on the high seas. The weather was fine at the time, it was daylight, and the ship was steady, and there was no suggestion that the duties of the deceased would lead him into any danger. There was a 4 ft. rail and bulwark all round the ship, and there was no evidence to show how the deceased had fallen overboard. The deceased was last seen at 5.35 a.m. going aft.

HELD—that it was for the applicant to establish that the accident complained of arose "out of and in the course of the employment" of the deceased; that the applicant had failed to discharge that onus; and that the facts of the case did not warrant the inference that the accident arose "out of" the employment of the deceased, because it was admitted that it happened "in the course of" it.

*Seem*, that if on a stormy night one of the watch of a ship was missing, the inference to be drawn would be that the man had been washed overboard "in the course of" his employment; and that the accident arose "out of" his employment.

BENDER *v.* OWNERS OF STEAMSHIP ZENT, [1909] 2 K. B. 41; 78 L. J. K. B. 533; 100 L. T. 639—C. A.

**43. Evidence—Inference of Fact—Seaman Found Drowned Beside Vessel—No Direct Evidence as to how Death Occurred—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1).]**—M., who was employed as an engineer on board a small steam tug, was last seen asleep in his bunk at 5 a.m. An hour afterwards he had disappeared, leaving his working clothes laying at the side of his bunk. The tug was to commence towing at 7 a.m. that morning, and steam had been ordered to be got up for that hour. The deck was a place where between 5 and 7 a.m. M. was entitled to be. Two days afterwards M., clad in his ordinary sleeping clothes, was found drowned in the water near the place where the tug had been moored on the morning in question. There was no direct evidence as to how M. (who was unable to swim) had met with his death.

HELD—that the arbiter was entitled to draw the inference of fact that M. had accidentally fallen overboard, and that the accident arose out of and in the course of his employment.

MACKINNON *v.* MILLER, [1909] S. C. 373; 46 [Sc. L. R. 299—Ct. of Sess.

**44. Evidence—Workman Found Dead where he had no Right to be—Onus—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1).]**—A craneman in locomotive works in charge of two overhead cranes in one of two neighbouring bays was found dead in the other bay. His employment was intermittent. The arbiter found that the deceased had no right whatever to be there, unless he had been called across by the night foreman for something special, or unless there were no other craneman on duty; that no evidence had been adduced of any request having been made by the night foreman,



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that official not having been called as a witness and that the other crane-man was on duty.

**HELD**—that the accident was not one arising out of and in the course of the deceased's employment.

**MILLER v. NORTH BRITISH LOCOMOTIVE CO.**  
[L.D., [1909] S. C. 698; 46 Sc. L. R. 755  
Ct. of Sess.]

**45. Workman Going Home from Work—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.]**—The applicant was employed by the respondents in their colliery. Owing to some accident to the machinery, the applicant and other workmen were told to ascend the pit earlier than usual. The applicant did ascend, and his work for the day being over, he prepared to go home. There were three ways by which he could go home; of these one, which was the shortest for the applicant, led over certain parts of the colliery premises and across some lines which were under the control of the respondents. This way was his usual way home, and it was found that it was so used by him and others with the knowledge of the respondents. On the day in question the applicant went by this way. In order to cross the line he got under some trucks, and while he was so doing the trucks were moved and some of them went over his legs, crushing them, and necessitating their amputation.

**HELD**—that the accident arose out of and in the course of the employment, and that the applicant was entitled to compensation under the Workmen's Compensation Act, 1906.

**GANE v. NORTON HILL COLLIERY CO.**, [1909]  
[2 K. B. 539; 78 L. J. K. B. 921; 100 L. T.  
979; 25 T. L. R. 640—C. A.]

**46. Dinner Hour—Needless Risk by Workman for His own Pleasure—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.]**—A workman was employed in the defendants' works. In those works there was a large hot-water tank, 5½ feet from the floor, and to get to the top of it there was a platform, the top of the tank being 2½ feet higher than the platform. No one except the chief engineer and the chief stoker were allowed to deal with the tank in any way. The room in which the tank was situated was about 150 yards from the room in which the particular workman was employed. One night, while working on the night-shift, the workman ate his supper at the top of the tank, and when he had finished and was about to go back to his work he fell through an aperture into the tank and thereby sustained injuries which resulted in his death.

**HELD**—that the accident did not arise out of the workman's employment.

**BRICE v. EDWARD LLOYD, LD.**, [1909] 2 K. B.  
[804; 101 L. T. 472; 25 T. L. R. 759; 53  
Sol. Jo. 744—C. A.]

**47. Workman Employed to Watch Trawlers—Accident while Returning from getting Refreshment—Workmen's Compensation Act, 1906**

(6 Edw. 7, c. 58), s. 1.]—A workman was employed to watch trawlers as they lay in a harbour. He was on duty for twenty-five hours, during which time he had to provide his own food, and in connection with his duties it was occasionally necessary for him to be on the quay to which the trawlers were moored. In the course of his watch he left the boats and went to an hotel near at hand for some refreshment. He was absent a very short time, and on his return, while descending a fixed ladder attached to the quay to go on board one of the trawlers, he fell into the water and was drowned. The arbitrator found that the accident to the deceased arose out of and in the course of his employment within the meaning of sect. 1 of the Workmen's Compensation Act, 1906.

**HELD** (Lord Loreburn, L.C., and Lord Gorell dissenting)—that there was evidence upon which the arbitrator could so find.

Decision of the Second Division of the Court of Session ([1909] S. C. 63; 46 Sc. L. R. 55) reversed.

**LOWRIE JACKSON (PAUPER) v. GENERAL STEAM FISHING CO., LD.**, [1909] A. C. 523; 78 L. J. P. C. 148; 101 L. T. 401; 25 T. L. R. 787; 53 Sol. Jo. 763—H. L.]

**48. Driver of Canal Boat—Forbidden to Steer or otherwise to Manage Boat—Drowned whilst Steering—Emergency—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1.]**—A man employed by the owner of a canal boat as driver, who was forbidden by his master to take part in the steering or management of the boat, was drowned whilst engaged in steering. A boatman, who had been temporarily in charge of the horse, had deserted a short time before the accident, and the other boatman, who was also the master, then decided to drive, ordering the deceased at the same time to steer.

**HELD**—that no emergency had arisen; that the deceased had, in taking part in the steering of the boat, violated the orders of his employer, and that, therefore, the accident did not arise out of and in the course of the employment.

**WHELAN v. MOORE**, 43 I. L. T. 205—C. A., [Ireland.]

## (1) Practice.

### (1) Appeals and New Trials.

See also No. 51, *infra*.

**49. Appeal from County Court Judge—Question of Law—Preliminary Point as to Jurisdiction—Appeal to Court of Appeal—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (4).]**—By Sched. II. (4) of the Workmen's Compensation Act, 1906, an appeal now lies to the Court of Appeal from any decision given by a county court judge under the Act on a question of law, such as one given on a preliminary question of jurisdiction.

**MOSS v. GREAT EASTERN RY. CO.**, [1909] 2 K. B. 274; 78 L. J. K. B. 1048; 100 L. T. 747—C. A.]

# I. Liability of Master for Injury to Servant— Continued.

**50. Permanent Incapacity for Particular Work—No Finding of Incapacity for any Work—Proper Remedy—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I (1) (b).]**—A workman was awarded compensation on the ground that he was "permanently incapacitated for work at his trade of stonebreaking." His employer objected to the award on the ground that it had not proceeded on a finding that the workman was incapacitated for any description of work.

**HELD**—that the Court would not interfere with the judgment of the Sheriff-Substitute, as any injustice arising therefrom could be obviated by subsequent application for review.

DOHARTY v. BOYD, [1909] S. C. 87; 46 Sc. [L. R. 71—Ct. of Sess.

## (2) Costs.

**51. Costs of Arbitration—Assessment of Lump Sum—Jurisdiction of County Court Judge—Appeal—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, Sched. II., 4, 7—Workmen's Compensation Rules, 1907, r. 61 (1)—R. S. C., Ord. LXV., rr. 1, 23.]**—Having regard to the words "shall be taxed" in Sched. II. (7) to the Workmen's Compensation Act, 1906, the county court judge has no jurisdiction to order payment of a lump sum as the costs of an arbitration under that Act, and the words of Sched. II. (4), "where" the county court judge "makes any order under this Act," render such an order the subject of appeal to the Court of Appeal.

BEADLE v. OWNERS OF S. NICHOLAS, [1909] [W. N. 227; 101 L. T. 586—C. A.

## (3) Arbitration.

**52. Arbitration under Workmen's Compensation Act, 1906—False Evidence—Judicial Proceeding—Perjury at Common Law—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 3, Sched. II., ss. 1 to 4—Workmen's Compensation Rules, 1907, Nos. 2 (1), 27 (1) and 81.]**—An arbitration before a county court judge under sect. 1, sub-sect. 3, of the Workmen's Compensation Act, 1906, is a judicial proceeding, and the wilful and corrupt giving of false evidence at such a proceeding is perjury at common law.

R. v. CROSSLEY, [1909] 1 K. B. 411; 78 L. J. [K. B. 299; 100 L. T. 463; 73 J. P. 119; 25 T. L. R. 225; 53 Sol. Jo. 214—C. C. A.

**53. Arbitration Proceedings before County Court Judge—Discovery—Jurisdiction of Registrar to Order Interrogatories—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (4)—Workmen's Compensation Rules, 1907, rr. 27, 61.]**—In arbitration proceedings under the Workmen's Compensation Act, 1906, the registrar of a county court has no jurisdiction to make an order for discovery or for leave to deliver interrogatories.

SUTTON v. GREAT NORTHERN RY. CO., [1909] [2 K. B. 791; 101 L. T. 175—C. A.

# (m) Redemption of Payment.

**54. Permanent Incapacity—Partial Capacity for Work—Method of Calculation—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (17).]**—A workman sustained injuries in the course of his employment whereby he lost his arm. By memorandum of agreement duly recorded his employers agreed to make him a weekly payment of 16s. from the date of the accident during the period of his incapacity. After the weekly payment had been made for six months, they applied to the sheriff-substitute, as arbiter, to have it redeemed by payment of a lump sum in terms of clause 17 of the first schedule of the Workmen's Compensation Act, 1906. The sheriff-substitute, without inquiry as to the workman's capacity for work, fixed the amount of the lump sum as calculated from the weekly payment, on the footing of permanent incapacity under the first branch of the clause.

**HELD**—that the arbiter was right.

NATIONAL TELEPHONE CO., LD. v. SMITH, [1909] S. C. 1363; 46 Sc. L. R. 988—Ct. of Sess.

# (n) Registration of Agreement.

**55. Infant Dependants—Agreement as to Amount of Compensation—Approval of Registrar—Discharge of Employer—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9) (d)—Workmen's Compensation Rules, 1908, r. 4.]**—Where someone on behalf of an infant dependant agrees, so far as he can do so, to the payment by the employer of a certain sum into Court, the registrar must protect the infant's interest; if he is not satisfied as to the adequacy of the amount, he must refer the matter to the Judge, who must then serve notice on the employer; if, however, the registrar is satisfied and evidences that fact by signing the receipt for the money, the agreement is binding, and the employer is freed from liability.

RHODES v. SOOTHILL WOOD COLLIERY CO., LD., [1909] 1 K. B. 191; 78 L. J. K. B. 141; 100 L. T. 14—C. A.

**56. Jurisdiction of County Court Judge—No Power to Increase Agreed Sum—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II., s. 9 (d).]**—Upon an application for the registration of a memorandum of agreement whereby an injured servant agreed to accept a lump sum in satisfaction of all claims for compensation, the registrar of the county court refused to record the same, on the ground that the lump sum agreed to be paid was inadequate, and he referred the matter to the judge. The judge found that the sum was inadequate, and assessed the amount to be paid by the employer at a much higher figure.

**HELD**—that the matter which was referred to the county court judge was simply and solely whether the agreement was one which ought or ought not to be recorded; and that he had no power to treat the agreement as a submission by the employer to pay any sum which the county

### I. Liability of Master for Injury to Servant— *Continued.*

court judge under the circumstances might think just.

MORTIMER v. SECRETAN, [1909] 2 K. B. 77; 78  
[L. J. K. B. 521; 100 L. T. 721—C. A.]

**57. Workman Returned to Work and Earning Same Wages—Possibility of Incapacity Recurring—Recording Agreement with Stay of Execution—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9).]**—It is competent for an employer, on an application by a workman to record a memorandum of agreement as to compensation between himself and his employer, to say that the workman has completely recovered, has returned to work, and is earning his old wages, and if the county court judge finds that these allegations are established, he ought to decline to record the agreement, unless he thinks the case is one in which the effects of the accident to the workman may afterwards appear not to have been got rid of. In the latter case the county court judge may order the agreement to be recorded, and stay execution with a view to an application by the employer to review or terminate it.

CHARING CROSS, EUSTON, AND HAMPSTEAD  
[RY. CO. v. BOOTS, [1909] 2 K. B. 640; 78  
L. J. K. B. 1115; 101 L. T. 53; 25 T. L. R.  
683—C. A.]

**58. Genuineness of Agreement—Workman no longer Incapacitated—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II. (9).]**—A memorandum of agreement providing for compensation to a workman "during his total incapacity for work" which accurately expresses the agreement between the parties is "genuine" in the sense of Sched. II. (9) of the Workmen's Compensation Act, 1906, although at the date when it is presented for recording the workman is no longer incapacitated.

ROBERT ADDIE AND SONS, LD. v. COAKLEY,  
[[1909] S. C. 545; 46 Sc. L. R. 408—Ct. of  
Sess.]

**59. Memorandum of Agreement—Recording—Judicial Act—Finality—Application to Rectify Register—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. II. (8), (10).]**—When a memorandum has been declared to be a genuine memorandum and duly recorded as such—which is not a mere ministerial and administrative act—the matters between the parties are finally determined, and therefore on a subsequent application for rectification of the register they cannot, in the absence of mutual mistake or fraud, be gone into for the purpose of ascertaining whether the agreement which was entered into was simply an agreement in words and not an agreement in law.

MASTERMAN v. ROPNER & SONS, LD., 127 L. T.  
[Jo. 8—C. A.]

#### (o) Reviewing Award.

**60. Reduction or Termination of Compensation—Muscular Condition Restored—Continuing**  
Y.D.

*Nervous Effects of Accident—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (16).]*—On an application by an employer to have weekly payments of compensation reduced or terminated, it is not sufficient for the employer to show that the muscular mischief caused by the accident has come to an end. Where the workman is not malingering, his mental, or nervous, or hysterical condition resulting from the accident must be considered as well as his merely physical condition.

EAVES v. BLAENCLYDACH COLLIERY CO., LD.,  
[[1909] 2 K. B. 73; 78 L. J. K. B. 809; 100  
L. T. 751—C. A.]

**61. Review of Weekly Payments—Jurisdiction to Make Nominal Award—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (16).]**—On an application by an employer for a review of weekly payments there is jurisdiction to make a nominal award of 1d. per week and so to keep alive the claim for compensation where the workman is quite able to resume his employment as before the accident, but there is a possibility of incapacity recurring.

Singer Manufacturing Co. v. Clelland ((1905)  
7 F. (Ct. of Sess.) 975; 42 Sc. L. R. 757)  
doubted.

OWNERS OF VESSEL TYNRON v. MORGAN, [1909]  
[2 K. B. 66; 78 L. J. K. B. 857; 100 L. T. 641  
—C. A.]

**62. Date from which Liability may be Terminated—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), Sched. I. (12).]**—If an application by an employer to review and end weekly payments under the Workmen's Compensation Act, 1897, on the ground of the workman's complete recovery, does not specify any date in connection with such recovery, a county court judge has no jurisdiction to make an order terminating the weekly payments from a date antecedent to that of the application.

UPPER FOREST AND WESTERN STEEL AND  
[TINPLATE CO., LD. v. THOMAS, [1909] 2 K. B.  
631; 78 L. J. K. B. 1113—C. A.]

**63. Date from which Liability May be Terminated—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I. (16).]**—It is not competent for an arbitrator under the Workmen's Compensation Act, 1906, on a simple application to review and end payment of compensation to a workman on the ground that his incapacity has ceased, to make an order terminating the liability of the employer from a date antecedent to the application; but, *semble*, if there is a formulated dispute as to the workman's incapacity at a definite date antecedent to the application, it is competent for the arbitrator to decide that dispute.

Upper Forest and Western Steel and Tinplate  
Co., Ltd. v. Thomas (*supra*) applied.

CHARING CROSS, EUSTON AND HAMPSTEAD  
[RY. CO. v. BOOTS, [1909] 2 K. B. 640; 78  
L. J. K. B. 1115; 101 L. T. 53; 25 T. L. R.  
683—C. A.]



### I. Liability of Master for Injury to Servant— *Continued.*

**64. Date from which Weekly Payment may be Varied—***Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), *Sched. I. (16)*.—Where an application to review a weekly payment under the *Workmen's Compensation Act, 1906*, is brought before an arbitrator, and the workman has recovered prior to the date of the application, the arbitrator is not bound to treat the agreement for, or award of, the weekly payment as enforceable up to the date of his decision, but is entitled to vary the payment as from the date of the application, though not from any earlier date.

*Steel v. Oakbank Oil Co., Ltd.* ((1902) 5 F. 244; 40 Sc. L. R. 205), and *Pumpherson Oil Co., Ltd. v. Cavaney* ((1903) 5 F. 963; 40 Sc. L. R. 724) overruled.

*Morton & Co., Ltd. v. Woodward* ([1902] 2 K. B. 276—C. A.) approved.

*DONALDSON BROTHERS v. COWAN*, [1909] S. C. [1292; 46 Sc. L. R. 920—Ct. of Sess.

**65. Continuance of Incapacity—Original Cause—Supervening Cause—Onus of Proof—***Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 1 (1), *Sched. I. (16)*.—On the ground that the workman's incapacity had totally ceased, an employer applied to the sheriff as arbiter for review of a weekly payment. The sheriff found (1) that the workman was unable to work in consequence of a cardiac affection "which was not proved" to be in any way connected with the injuries sustained in the employment; (2) that "it was not proved" that the workman still suffered from the injuries in such a way as to render him incapable of work.

**HELD**—that the arbiter was not right in declaring the compensation ended, as his findings did not import that the employer had discharged the onus which lay on him of proving that the workman had recovered from the original injuries.

*QUINN v. McCALLUM*, [1909] S. C. 227; 46 [Sc. L. R. 141—Ct. of Sess.

**66. Earning Capacity after Accident—Method of Calculation—Carrying on Business—Public House—***Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), *Sched. I. (2) (a), (3)*.—Employers applied to a sheriff as arbiter to diminish or end the weekly payment of 18s. 3d. agreed to be paid by them to a miner injured in their employment on April 15th, 1908, and maintained that his incapacity had ceased or at least was lessened. The arbiter found that the miner had not recovered from the effects of the accident, and was unfit to resume work as a miner; that his average weekly earnings prior to the accident were £1 16s. 6d., giving an annual income of about £94; that he had from Whitsunday, 1908, to Whitsunday, 1909, carried on a publichouse; that he had invested about £100 of capital therein; and that the net profits for said year, after allowing for interest on capital, wages, and other expenses, amounted to about £98. The sheriff took this sum of £98 as the measure of

the earning capacity of the miner, and accordingly found that the miner's incapacity for work had terminated, and ended the weekly payment.

**HELD**—that the sheriff's method of arriving at wage-earning capacity was fallacious, and that he should have ascertained what work the man actually did in the publichouse, and what these services would have been considered worth if he had been serving someone else instead of himself.

*PATERSON v. A. G. MOORE & Co.*, 47 Sc. L. R. [30—Ct. of Sess.

**67. Application by Workman—Partial Incapacity—Inability to Find Work—No Change in Physical Condition—***Workmen's Compensation Act, 1897* (60 & 61 Vict. c. 37), *Sched. I. (2)*, (12).—On an application by a workman for review of weekly payments made in respect of partial incapacity, he did not aver any change in his physical condition, but maintained that he must be held in law to be totally incapacitated in respect that his employers were unable to give him suitable light work, and that he was unable to find light employment elsewhere.

**HELD**—that the workman had failed to state any grounds on which the arbiter would be entitled to review the weekly payments.

*BOAG v. LOCHWOOD COLLIERIES, LD.*, 47 Sc. [L. R. 47—Ct. of Sess.

### (p) Serious and Wilful Misconduct.

**68. Breach of Rule—Miner—***Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 1, sub-s. 2 (c).—The appellant, who was a bottomer employed at a mid-working in the mine, called to the bottomer at the foot of the shaft to send up the cage. The latter signalled to the engineman to raise the cage. By the system of signalling in use in the mine, the engineman, on receiving a signal to raise the cage, was entitled, unless stopped by a further signal, to raise the cage to the pit-head, and sometimes, as on the occasion in question, he did so without stopping at the mid-working. The appellant, without ascertaining whether the cage had stopped or not, opened the gate fencing the shaft, pushed his hutch forward, and fell with it down the shaft and was injured. In opening the gate fencing the shaft before the cage was stopped at the mid-working the appellant committed a breach of a rule in operation in the mine. The appellant knew of the rule, and was warned regarding it only a few days before the accident occurred. In an application for compensation under the *Workmen's Compensation Act, 1906*, the arbitrator found that the appellant had been guilty of "serious and wilful misconduct" within the meaning of sect. 1, sub-sect. 2 (c), of the Act, and was consequently not entitled to compensation.

**HELD**, dismissing the appeal—that the question was one of fact for the arbitrator and that there was evidence to support his finding.

Per Lord Loreburn, L. C.—It is not the province of the Court to lay down that the breach of a rule is *prima facie* evidence of serious and

# I. Liability of Master for Injury to Servant— *Continued.*

wilful misconduct. That is a question purely of fact to be determined by the arbitrator, who must decide it for himself, and ought not to be affected by artificial presumptions of fact.

Decision of the First Division of the Court of Session (15 Sc. L. R. 686) affirmed.

GEORGE v. GLASGOW COAL COMPANY, [1909] A. C. 123; 78 L. J. P. C. 47; 99 L. T. 782; 25 T. L. R. 57; [1909] S. C. (H. L.) 1; 46 Sc. L. R. 28—H. L.

## (q) Undertakers.

*See also* No. 78, *infra*.

69. *Contract to Navigate Lighter for Owners from England to Place Abroad—Injury to one of Contractors' Crew—Liability of Owners—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 4, sub-s. 1.]—Coal owners and lightermen who have purchased a lighter in England for use abroad, and have contracted for its navigation from England in return for a lump sum, are liable under sect. 4, sub-sect. 1, of the Workmen's Compensation Act, 1906, as having in the course of and for the purposes of their business contracted for the execution of part of the work proper to their undertaking, to pay compensation to a man injured on the lighter during the voyage.

DITTMAR v. OWNERS OF SHIP V. 593, [1909] 1 K. B. 389; 78 L. J. K. B. 523; *sub nom.* DITTMAR v. WILSON, SONS & CO., 100 L. T. 212; 25 T. L. R. 188—C. A.

70. *Sub-contracting—Land Acquired by Municipal Corporation for Extension of Market—Removal of House on Land—Contractor—Injury to Person Employed by Contractor—Liability of Corporation—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58, ss. 1, 4, 13.)—A municipal corporation bought for the extension of their market land on which were the ruins of an old mill. T. made an offer of £15 for the bricks and undertook to pull down the mill and clear the site; and this offer was accepted by the corporation. In the course of demolishing the mill a workman was fatally injured, and his widow claimed compensation against T. and the corporation.

HELD—that the demolition of the mill was work undertaken by the corporation, that it was done by virtue of the contract made with T. for that purpose, and that, by virtue of sects. 4 and 13 of the Workmen's Compensation Act, 1906, the corporation were liable as principals.

MULROONEY v. TODD AND BRADFORD CORPORATION, [1909] 1 K. B. 165; 78 L. J. K. B. 145; 100 L. T. 99; 73 J. P. 73; 25 T. L. R. 103; 53 Sol. Jo. 99—C. A.

71. *Sub-contracting—Liability of Principal for Accident to Sub-contractor's Son—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), ss. 4, 13.]—Under sect. 4 of the Workmen's Compensation Act, 1906, a principal is not liable to pay compensation to a person who has no claim against his immediate employer, the contractor.

The respondents, who had contracted to purchase and carry away growing timber, contracted with M. to do part of the work—namely, the felling of the timber. M. employed the applicant, who was his son, to assist him in the work, and while he was so assisting, the applicant met with an accident which arose out of and in the course of his employment.

HELD—that having regard to the definition of "workman" in sect. 13 of the Workmen's Compensation Act, 1906, the applicant was not entitled to claim compensation under the Act from his father, and that by sect. 4 the respondents were not liable as principals to pay compensation to a person who had no claim against the contractor, the applicant's immediate employer.

MARKS v. CARNE, [1909] 2 K. B. 516; 78 L. J. K. B. 853; 100 L. T. 950; 25 T. L. R. 620; 53 Sol. Jo. 561—C. A.

72. *"Purposes of Trade or Business"—Shipowner—Cleaning of Boilers—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 4.]—A shipowner contracted with W. for the cleaning of the boilers in one of his vessels. W. engaged a number of boiler-scalers to do the work, and one of them, S., while so employed, was injured by an accident. The work of boiler-scaling is occasionally performed by shipowners themselves through their own employees without the intervention of a contractor.

HELD—that the work of boiler-scaling was not work undertaken by the shipowner in the course of or for the purposes of his trade or business in the sense of sect. 4 of the Workmen's Compensation Act, 1906, and that the shipowner was therefore not liable to S. in compensation under said section.

SPIERS v. ELDERSLIE STEAMSHIP CO., LD., [1909] S. C. 1259; 46 Sc. L. R. 893—Ct. of Sess.

73. *Sub-contracting—"Work Undertaken by the Principal"—Some Obligation on Principal to do Work—Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 4, sub-s. 1.]—The expression "work undertaken by the principal" contained in sect. 4 of the Workmen's Compensation Act, 1906, imports some obligation on the principal to do the work.

A farmer arranged with the applicant, a young lad, for the services of a thrashing machine—the machine and horses being the property of the applicant's father, who was to be paid 20s. out of 25s., which was the sum stipulated for—and in the course of the work the applicant was injured. The county court judge found as a fact that there was no contractual relation with the applicant; that the contract was with the father, and that the applicant was merely a substitute for him.

HELD—that the applicant was not entitled to compensation under sect. 4 of the Act of 1906, there being no "work undertaken by the principal" within the meaning of that section. WALSH v. HAYES, 43 L. L. T. 111—C. A. Ireland.

# I. Liability of Master for Injury to Servant.— (Continued.)

## (r) Workman.

**74. Contract of Service—Medical Officer of Health.**—*Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 13.]—There is no contract of service between a "dispensary doctor" and the guardians of his district, and he is not therefore entitled to compensation if injured in the discharge of his duties.

MURPHY v. ENNISCORTHY GUARDIANS, [1908]  
[2 I. R. 609; 73 J. P. 63—C. A.]

**75. Fisherman Paid by Share of Profits—Casual Employment for Fixed Payment.**—*Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 7 (2).]—The applicant was a "share hand," i.e., a seaman paid by a share of profits, on board one of the respondents' trawlers. Besides their fleet of trawlers, the respondents owned some steam cutters, one of which collected the fish each day from the trawlers and carried it to Billingsgate. Extra labour was required to pack and stow the fish in the cutter, and it was the practice for the skipper of the cutter to invite one of the share hands from a trawler to assist in this work on the cutter, and if the share hand chose to accept such invitation, he received a fixed sum of money for the work, part of which he divided among the other men on the trawler, and part he retained as his own share. While engaged in stowing fish on board a cutter the applicant was injured, and in respect of his injuries he claimed compensation under the *Workmen's Compensation Act, 1906*.

HELD—that the applicant's casual employment on board the cutter arose out of and was incidental to his employment as a share hand, and therefore, by virtue of sect. 7 (2) of the *Workmen's Compensation Act, 1906*, he was excluded from the benefits of the Act.

WHELAN v. GREAT NORTHERN STEAM SHIPPING  
[Co., LD., [1909] W. N. 135; 78 L. J. K. B.  
860; 100 L. T. 913; 25 T. L. R. 619—C. A.]

**76. Workman Engaged by Central (Unemployed) Body—Accident to Workman while so Engaged.**—*Unemployed Workmen Act, 1905* (5 Edw. 7, c. 18), s. 1—*Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), ss. 1, 13.]—The Central Body, constituted under sect. 1 of the *Unemployed Workmen Act, 1905*, provided temporary work for a workman. In the course of his employment the workman received injuries from the effect of which he died.

HELD—that the Central Body were "employers" within the meaning of the *Workmen's Compensation Act, 1906*, and were therefore liable to pay compensation to the deceased workman's widow.

PORTON v. THE CENTRAL (UNEMPLOYED)  
[BODY FOR LONDON, [1909] 1 K. B. 173; 78  
L. J. K. B. 139; 100 L. T. 102; 73 J. P. 43;  
25 T. L. R. 102—C. A.]

**77. Workman Engaged in Temporary Work Provided by Distress Committee—Unemployed Workmen Act, 1905** (5 Edw. 7, c. 18), ss. 1, 2—

*Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 13.]—A distress committee under the *Unemployed Workmen Act, 1905*, provided temporary work for an applicant, in the course of which he was injured.

HELD—that the distress committee were "employers" within the meaning of the *Workmen's Compensation Act, 1906*, and were therefore liable to pay compensation.

PORTON v. CENTRAL (UNEMPLOYED) BODY FOR LONDON (*supra*) followed.

GILROY v. MACKIE, [1909] S. C. 466; 46  
[Sc. L. R. 325—Ct. of Sess.]

**78. Lecturer—Principal—Contractor—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), ss. 4, 13.]—By an agreement entered into between the appellant corporation and one L., the latter was to keep an airship on exhibition in the corporation's grounds and was to pay the wages of a turnstile man who was to be the servant of the corporation. Admission to the enclosure to view the airship was only to be obtained by ticket through registering turnstiles or by tickets to be provided by the corporation, and all moneys were to be collected daily by the money-takers employed by the corporation. L. was to receive 50 per cent. of the gross receipts, and thereon he had to pay the persons engaged by him. The corporation were to receive the remaining 50 per cent. L. was not to acquire any legal interest or estate in the place allotted to him, but was merely permitted to use the same for the special purpose. For the purpose of carrying out his part of the agreement L. engaged a lecturer whose duties were to explain the various parts of the airship and the exploits of L. After the airship had been on exhibition for some time it exploded, and the lecturer was so severely burned that he died as the result of the accident. In a claim for compensation by his widow:—

HELD—(1) that the lecturer was not a "workman" within the meaning of sect. 13 of the *Workmen's Compensation Act, 1906*; and (2) that assuming the lecturer was a workman his widow's remedy was against L. and not against the corporation.

WAITES v. THE FRANCO-BRITISH EXHIBITION  
[(INCORPORATED), 25 T. L. R. 441—C. A.]

**79. Professional Football Player—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), ss. 1, 13.]—The applicant was engaged by the Crystal Palace Football Company (Ltd.) as a professional football player at a weekly wage, and he agreed to give his whole time to the club, to attend regularly to training, and to observe the training and general instructions of the club. While playing in a football match, the applicant met with an accident which incapacitated him from earning wages in any suitable employment.

HELD—that the applicant was a "workman" within the definition in sect. 13 of the *Workmen's Compensation Act, 1906*, and that he was entitled to compensation.

WALKER v. CRYSTAL PALACE FOOTBALL CLUB,  
[[1909] W. N. 225; 101 L. T. 645; 26 T. L. R.  
71; 54 Sol. Jo. 65—C. A.]



# I. Liability of Master for Injury to Servant— *Continued.*

**80. Owner of Horse Engaged to Bring Horse and Drag Logs of Timber from One Place to Another—Payment Including Use of Horse—No Obligation to do Work Personally—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.]** A party was engaged by a firm of timber merchants to bring a horse belonging to him and drag logs of timber from the side of a ship which was being unloaded in harbour to a place where the logs were stored. He received a certain sum per day for himself and his horse, and he might have got that sum by sending a servant, if he had one, to lead his horse. He was under no obligation to come on any particular day and he could be told not to come until he was wanted.

**HELD**—that he was not a "workman" within the Workmen's Compensation Act, 1906, but an independent contractor.

*Paterson v. Lockhart* ((1905) 7 F. 954; 42 Sc. L. R. 755) distinguished.

**CHISHOLM v. WALKER & Co.**, [1909] S. C. 31; [46 Sc. L. R. 24—Ct. of Sess.

**81. Sub-Contractor—Stonebreaker Engaged at Fixed Rate per Cubic Yard—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.]**—A. was engaged to break stones for road metal, at a fixed rate per cubic yard, by B., who had a contract for the supply of road metal with a county road authority, and who furnished A. with material. A. was injured while engaged on the work, and claimed compensation from B. under the Workmen's Compensation Act, 1906.

**HELD**—that A. was a "workman" in the sense of the Act.

**DOHARTY v. BOYD**, [1909] S. C. 87; 46 Sc. L. R. [71—Ct. of Sess.

**82. Boatman—Remuneration by Share of Gross Earnings of Boat—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 1 (1) and 7 (1).]**—A firm of fish curers engaged A. to work a "flitboat" belonging to them, and authorised him to find another man to go along with him. A. engaged B. to work under him on the boat, which was not in any sense a fishing boat, but was a boat used for carrying cargo between the curing stations and vessels lying off shore and landing goods from steamers. A. and B. were to be remunerated by one-third each of the gross earnings of the boat, the remaining third going to her owners. The boat was maintained by the firm, and both the men and the boat were subject to their orders. When not required by the owners the boat did "fitting" for other curers, such work being undertaken by A. as skipper on behalf of the boat, and the rates charged being the same as those paid by the firm to the boat for similar work. When the men were not employed afloat, the firm, whenever possible, supplied them with work ashore—e.g., cutting peats, &c., for which they were paid. No part of the capital embarked was supplied by A. or B., nor were they liable for any loss that might be incurred. In the course of his employment as boatman B. was drowned.

**HELD**—that B. was a "workman" in the sense of the Act.

**CLARK v. G. R. & W. JAMIESON**, [1909] S. C. [132; 46 Sc. L. R. 74—Ct. of Sess.

**83. Seaman—Vessel Let to Charterers—Employer—Charterer or Owner—Crew Provided and Paid by Owner—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 7, 13.]**—A., the registered owner of a steam tug, chartered her to B. Under the charterparty A. was bound to provide and pay a crew of two men, including M., and A. alone had power to dismiss them. The possession, control, and management of the vessel under the charterparty belonged to B.

**HELD**—that A., and not B., was M.'s employer within the meaning of the Workmen's Compensation Act, 1906.

**MACKINNON v. MILLER**, [1909] S. C. 373; [46 Sc. L. R. 299—Ct. of Sess.

**84. Employment of a "Casual Nature"—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.]**—A carpenter named M. was employed by N. to do repairs to his house, for which he was to be paid at the rate of 5s. a day. While these repairs were in progress N. engaged some men from a timber yard to cut down certain trees close to his house. These men commenced the cutting down of the trees, and whilst they were so engaged N. had a conversation with M. about the trees. M. said that when he had finished the repairs to the house he would cut down the trees, and that it would cost N. less than he was paying the other men. N. agreed to this, the arrangement being that M. was to be paid at the same rate as for the repairs, viz., 5s. a day. When M. had finished the repairs the services of the men at the trees were dispensed with, and M. started to cut and lop the remaining trees. Whilst so employed he fell from a ladder and was killed.

**HELD**—that the employment was of a casual nature, and that N. was not liable to pay compensation under the Workmen's Compensation Act, 1906.

**McCARTHY v. NORCOTT**, 43 I. L. T. 17—C. A., [Ireland.

**85. "Employment of a Casual Nature"—Otherwise than for the Purposes of the Employer's Trade or Business—Assisting to Repair Roof of Business Premises—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.]**—A man was casually employed to assist in repairing the roof of a house used solely for the purpose of the employer's business, and was killed by falling from the roof.

**HELD**—that his dependants were entitled to compensation.

**JOHNSTON v. MONASTEREVAN GENERAL STORE [Co.]**, [1909] 2 I. R. 108; 42 I. L. T. 268—C. A., Ireland.

## (8) Contracting Out.

**86. Scheme Certified under Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37)—Rules not**

### I. Liability of Master for Injury to Servant— *Continued.*

*Certified—No Recertification under Act of 1906—Claim under Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), ss. 13, 15, 16.]—By a contract entered into between the appellant railway company and their workmen a scheme under the Workmen's Compensation Act, 1897, was substituted for arbitration. This scheme, which had been certified by the Registrar of Friendly Societies, provided that the fund should be managed by a committee in accordance with rules, not inconsistent with the terms of the scheme, to be from time to time framed by the committee. One of the rules drawn up provided that any person becoming a member released on behalf of himself and his representatives and dependants all claims upon the company under the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1897, or otherwise. By another rule the decision of the committee on any dispute was to be final. The rules had not been certified. In February, 1906, the respondent workman became a member of the fund. In November, 1907, he met with an accident and received payments from the fund in respect thereof. In January, 1908, he was discharged by the appellants, and in October, 1908, he claimed compensation under the Workmen's Compensation Act, 1906. The scheme had not been recertified under that Act.

HELD—that the workman was not barred from claiming compensation under the Workmen's Compensation Act, 1906.

MOSS *v.* THE GREAT EASTERN RAILWAY COMPANY, [1909] 2 K. B. 274; 78 L. J. K. B. 1048; 100 L. T. 747; 25 T. L. R. 466—C. A.

#### (t) Surgical Operations.

**87. Additional Anæsthetic for Second Operation not Occasioned by Accident—Death under Anæsthetic—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.]—A workman received an injury in the course of his employment which necessitated the amputation of one of his fingers. He was put under anæsthetics and the finger was amputated. As he was recovering from the effects of the anæsthetic the surgeons decided to remove a bad tooth of which the workman had complained; further anæsthetics were administered, and an unsuccessful attempt was made to remove the tooth. The workman was then removed to a ward, and shortly afterwards he died. In a claim for compensation by his widow the county court judge held on the evidence that the workman died from failure of respiration caused by the administration of an anæsthetic, that it was at least as probable that his death resulted solely from a spasm induced by an attempt to swallow oozing blood in his mouth as that it resulted from the anæsthetic administered for the first operation, and consequently that the widow had not discharged the onus which rested upon her of proving that the workman's death resulted from his injury by the accident. He therefore refused to award compensation.

HELD—that the county court judge had arrived at a right conclusion.

CHARLES *v.* WALKER, LD., 25 T. L. R. 609—  
[C. A.]

**88. Unreasonable Refusal of Workman to Submit to Simple Surgical Operation—Continued Disability to Work as Result of such Refusal—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.]—A workman injured by accident arising out of and in the course of his employment, within the meaning of sect. 1 of the Workmen's Compensation Act, 1906, who refuses to submit to a surgical operation of a simple character involving no serious risk to life or health, and which, according to professional opinion, offers a reasonable prospect of the removal of the disability to work from which he suffers, and consequently would be in the interest of the workman to undergo, precludes himself from any right to claim further compensation under the Act for his continued disability, such continuance not being attributable to the original accident, but to his unreasonable refusal to avail himself of surgical treatment.

*Rothwell v. Davies* (19 T. L. R. 423) explained and distinguished.

*Donnelly v. William Baird & Co., Ltd.* (45 Sc. L. R. 394) approved and followed.

WARNCKEN *v.* RICHARD MORELAND & SON, LD., [1909] 1 K. B. 184; 78 L. J. K. B. 332; 100 L. T. 12; 25 T. L. R. 129; 53 Sol. Jo. 134—  
C. A.

**89. Refusal to Undergo Operation—Reasonableness of Refusal—Right to Further Compensation—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.]—Where the continued disability of a workman arises from his refusal to undergo an operation, the test is whether the refusal was unreasonable, not whether, on the balance of the medical testimony, the operation was reasonably safe. Where a workman, on the advice of his doctor, declines to undergo an operation the refusal is not unreasonable, and the workman is entitled to compensation during the whole period of his total or partial incapacity.

TUTTON *v.* OWNERS OF S.S. MAJESTIC, [1909] 2 K. B. 54; 78 L. J. K. B. 530; 100 L. T. 644; 25 T. L. R. 482; 53 Sol. Jo. 447—C. A.

**90. Second Operation Reasonably Necessary—Death under Anæsthetic—Novus Actus Interveniens—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.]—A workman met with an accident in the course of his employment and an operation was successfully performed. Subsequently it became necessary to perform the operation of grafting skin in order that the workman might get the full benefit of the first operation. The workman died under anæsthetics on the occasion of the second operation.

HELD—that the test was whether the step taken to obviate the consequences of the accident was a reasonable one, and that, the evidence

## I. Liability of Master for Injury to Servant— *Continued.*

being that it was, the workmen's representatives were entitled to compensation.

**SHIRT v. CALICO PRINTERS' ASSOCIATION, LD.,** [1909] 2 K. B. 51; 78 L. J. K. B. 528; 100 L. T. 746; 25 T. L. R. 451; 53 Sol. Jo. 430—C. A.

**91. Unreasonable Refusal to Submit to Simple Surgical Operation—Continued Incapacity—Burden of Proof—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 1.]—When a workman refuses to submit to an operation, two questions arise. First, Was the refusal unreasonable? Secondly, Is the continued incapacity the result of the refusal or the original accident? Where, therefore, the refusal was unreasonable, but there was a conflict of medical testimony as to the probable success of the operation, it was

**HELD**—that the arbitrator was entitled to come to the conclusion that the employers had not discharged the burden on them of showing that the continued incapacity was not due to the accident.

**Warneken v. Richard Moreland & Son, Ltd. (supra) and Tutton v. Owners of S.S. Majestic (supra)** considered and applied.

**MARSHALL v. ORIENT STEAM NAVIGATION CO.,** [Ld., [1909] W. N. 225; 101 L. T. 584; 26 T. L. R. 70; 54 Sol. Jo. 50—C. A.

### (u) Industrial Disease.

**92. Seaman—Disease Contracted on Board Ship—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 8.]—Paragraphs (i.) and (iii.) (and *semble* also paragraph (iii.) of sect. 8 (1) of the Workmen's Compensation Act, 1906, which relate to industrial diseases, are expressed in such a form as to be incapable of application to a seaman who contracts an industrial disease while serving on board his ship.

**CURTIS v. BLACK & CO.,** [1909] 2 K. B. 529; [78 L. J. K. B. 1022; 100 L. T. 977; 25 T. L. R. 621; 53 Sol. Jo. 576—C. A.

**93. "Lead Poisoning or its Sequelæ"—Accident—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 8, sub-ss. 1, 2, Sched. 3.]—Sect. 8 and Sched. III. of the Workmen's Compensation Act, 1906, brings "lead poisoning or its sequelæ" within the term "accident" in the Act. A workman, who was employed for many years as a painter, died from granular kidney. This disease was a *sequela* of lead poisoning, but it was also a *sequela* of gout, alcoholism, heart pressure, and other complaints. In proceedings for the assessment of compensation under the Act, it was not proved that lead poisoning was the cause of the granular kidney, but the employers did not prove that it was not the cause.

**HELD**—that it was not proved that death was caused by "lead poisoning or its sequelæ," and the employers were not liable to pay compensation.

When once it is proved that the death or disability has been caused by a disease mentioned

in the first column of Sched. 3 of the Act, and that the workman was employed in a process mentioned in the second column, then by sect. 8, sub-sect. 2, the burden is on the employer of proving that the disease was not due to the nature of the employment. But sub-sect. 2 has no application until it is shown that the case is within sub-sect. 1.

**HAYLETT v. VIGOR & CO.,** [1908] 2 K. B. 837; [77 L. J. K. B. 1132; 99 L. T. 74; 24 T. L. R. 885; 72 Sol. Jo. 741—C. A.

**94. Workman Ceasing to be in Employment Prior to Commencement of Act—Death Subsequent to Commencement of Act—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), ss. 8 (1) (iii.), 8 (4) (b), 16 (1).]—A stereotyper in the employment of a newspaper showed, early in 1907, symptoms of lead poisoning. He finally left the employment on June 22nd, 1907, and eventually died on September 14th, 1907.

**HELD**—that the provisions of the Workmen's Compensation Act, 1906, were not applicable, since the deceased was not on July 1st, 1907, the date of the commencement of the Act, in the employment of the respondents, or of any one else, and that accordingly his widow was not entitled to compensation.

**GREENHILL v. "THE DAILY RECORD," GLASGOW, LD.,** 46 Sc. L. R. 483—Ct. of Sess.

**95. Certificate of Certifying Surgeon—Obtained and Produced after Commencement of Proceedings—Workmen's Compensation Act, 1906** (6 Edw. 7, c. 58), s. 8 (1) (iii.), (4) (b).]—An arbitration is not rendered incompetent by reason of the certificate required under sect. 8 of the Workmen's Compensation Act, 1906, not being obtained or produced until after the commencement of arbitration proceedings.

**TAYLOR v. BURNHAM & CO.,** [1909] S. C. 704; [46 Sc. L. R. 482—Ct. of Sess.

## 2. Under Employers' Liability Act, 1880.

*See also* No. 9, *supra*.

**96. "Workman"—"Stage Manager" at Theatre—Duty to shift Furniture and Side Scenes—Employers and Workmen Act, 1875** (38 & 39 Vict. c. 90), s. 10—*Employers' Liability Act, 1880* (43 & 44 Vict. c. 42), s. 8.]—A person was employed by the owners of a theatre as "stage manager," but it was part of his duty to act as a stage hand, there being three other stage hands to do rough carpentry, and to shift the furniture and the side scenes.

**HELD**—that he was a "workman" within the Employers' Liability Act, 1880.

Decision of Div. Ct. (99 L. T. 19; 24 T. L. R. 617) affirmed.

**RUSHBROOK v. GRIMSBY PALACE THEATRE, ETC.** [100 L. T. 253; 25 T. L. R. 258—C. A.

**97. "Workman"—"Seaman"—"Rigger" at Dock—Merchant Shipping Act, 1854** (17 & 18 Vict. c. 104), s. 2—*Employers and Workmen Act, 1875* (38 & 39 Vict. c. 90), s. 13—*Employers' Liability Act, 1880* (43 & 44 Vict. c. 42), s. 8—



### I. Liability of Master for Injury to Servant— *Continued.*

*Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), s. 742.]—The word "seaman" in the Employers' Liability Act, 1880, is not defined by the Merchant Shipping Act, 1854, but bears its ordinary signification, and does not include a "rigger," a man who is casually employed in warping a vessel from one side of a dock to another.

Decision of Div. Ct. ([1909] 2 K. B. 36; 78 L. J. K. B. 398; 100 L. T. 338; 25 T. L. R. 286; 53 Sol. Jo. 270) reversed.

CHISLETT v. MACBETH & Co., [1909] 2 K. B. [811; 78 L. J. K. B. 1165; 101 L. T. 366; 25 T. L. R. 761; 53 Sol. Jo. 715—C. A.]

### 3. Apart from Workmen's Compensation and Employers' Liability Acts.

98. *Common Employment—Workman Traveling by Train from Work—Train Belonging to Employers—Accident while Workman in Train—Negligence of Another Employee.*—The respondents were the owners of two collieries, which communicated with each other, and also of a railway from the collieries to a neighbouring village. The railway was used for the conveyance of coal and materials to and from the collieries, and the respondents provided a train to take their workmen to and from their work at the collieries. The workmen paid nothing for conveyance, and they were under no obligation to travel by the train. The railway was managed entirely by the respondents. The part of the railway between the two collieries passed under a bridge. A mason, who was employed by the respondents to do work at both collieries, was, on the instructions of the respondents' engineer, who was the engineer at both collieries, engaged in building a wall to strengthen the bridge, and for that purpose he had erected a scaffolding close to the line. A workman who was employed by the respondents at one of the collieries was returning home by the railway and was seated on the floor of the carriage with his feet projecting beyond the carriage step. When the train was passing under the bridge his foot struck the scaffolding and he was thrown on the line and killed. In an action against the respondents to recover damages under the Fatal Accidents Act, 1846, the jury found that the accident was caused by the negligence of the mason and of the engineer.

HELD—that the negligence was that of a fellow-servant of the deceased workman, and that the respondents were not liable, the accident having happened on the respondents' premises, though the workman had at the time left off work and was on his way home.

Decision of C. A. ([1909] 1 K. B. 530; 78 L. J. K. B. 452; 100 L. T. 314; 25 T. L. R. 218; 53 Sol. Jo. 214) affirmed.

COLDRICK v. PARTRIDGE, JONES & Co., LD., [1909] W. N. 257; 26 T. L. R. 164; 54 Sol. Jo. 132—H. L.]

99. *Common Employment—Statutory Obligations—Coal Mines Regulation Act, 1887* (50 & 51

Vict. c. 58), ss. 49, 50—*Coal Mines Regulation Act, 1896* (59 & 60 Vict. c. 42).]—Statutory defences to proceedings of a criminal nature in respect of offences under the Coal Mines Regulation Acts are only defences in such proceedings, and are not statutory defences in civil proceedings based on the non-performance of statutory duties. Consequently, if a breach of statutory duties is alleged, it is no defence to the owners in civil proceedings that they have done the best in their power to ensure compliance with the statutory regulations, and that the negligence which has caused damage to one of their servants is the negligence of a fellow-servant.

Decision of Channell, J., reversed (Cozens-Hardy, M.R., dissenting).

DAVID v. BRITANNIC MERTHYR COAL CO. [1909] 2 K. B. 146; 78 L. J. K. B. 659; 100 L. T. 678; 25 T. L. R. 431; 53 Sol. Jo. 398—C. A.]

HELD—on appeal, that the jury had been misdirected in being told that, unless they were of opinion that there was evidence that the owner had connived at the breach of the regulations in question, they ought to find a verdict for him.

Decision of C. A. affirmed on different grounds.

BRITANNIC MERTHYR COAL CO. v. DAVID [1909] W. N. 257; 26 T. L. R. 164; 54 Sol. Jo. 151—H. L.]

100. *Common Employment—Duration of Employment.*—A workman was employed as a casual labourer, paid by the hour, upon a ship in dock, his work ending at 6 p.m. Shortly after that hour, while proceeding along the quay to receive his wages at his employers' pay-box, which was situated about fifty yards from the ship, and off the employers' premises, he was injured by the fall of a stanchion owing to the alleged negligence of the employers' servants on board the ship. The employers pleaded common employment to an action for damages.

HELD—that the relation of master and servant terminated when the workman finished his work and left the employers' premises, that it was not prolonged until the wages were paid, and that the defence of common employment failed.

PERCY v. DONALDSON BROS., [1909] S. C. 267; [46 Sc. L. R. 199—Ct. of Sess.]

### II. LIABILITY OF MASTER FOR INJURY BY SERVANT: SCOPE OF AUTHORITY.

See also *ANIMALS*, No. 11; *RAILWAYS*, No. 33.

101. *Hospital—Injury to Patient through Negligence in Operation—Liability of Governors.*—The governing body of a hospital do not undertake to perform operations themselves, but to supply a medical staff consisting of persons in whose selection they have taken due care. Though some members of this medical staff, such as nurses and carriers, are for some purposes the servants of the corporation, yet during the

## II. Liability of Master for Injury by Servant— *Continued.*

operation they take their orders from the surgeons and cannot be considered servants of the corporation. The corporation therefore is under no liability to a patient in respect of injuries incurred by reason of the negligent performance of an operation.

Decision of Div. Ct. (25 T. L. R. 468) affirmed.

**HILLYER v. GOVERNORS OF ST. BARTHOLOMEW'S [HOSPITAL, [1909] 2 K. B. 820, 78 L. J. K. B. 958; 101 L. T. 368; 25 T. L. R. 762; 53 Sol. Jo. 714; sub nom. HILLYER v. LONDON CORPORATION, 73 J. P. 501—C. A.]**

**102. Negligence—Scope of Employment—Evidences.**—In an action for the negligent driving of a motor car belonging to the defendant, evidence was given that defendant's brother, H. R., who was driving the motor, was in the employment of the defendant, and that it was in the course of his employment to drive motors when testing them, and occasionally when delivering them to customers, but that at the time when the accident occurred he was driving his brother's car without his permission.

**HELD** (Sir S. Walker, L.C., dissenting)—that there was no evidence to support the finding of the jury, that H. R. was when the accident occurred acting as the servant of the defendant within the scope of his employment, and that judgment was rightly entered for the defendant.

**DOWLING v. ROBINSON, 43 I. L. T. 210—C. A. [Ireland.]**

## III. CONTRACTS BETWEEN MASTER AND SERVANT NOT RELATING TO PERSONAL INJURIES.

*See also* INFANTS, No. 4.

**103. Employee Agreeing not to Give Notice—Injunction not Granted to Restrain Breach.**—An agreement by a servant not to give notice to leave his master's service is affirmative in substance, although negative in form, and therefore ought not to be enforced by injunction.

**Davis v. Forman** ([1894] 3 Ch. 654; 1 W. R. 168—Kekewich, J.) followed.

**KIRCHNER & Co. v. GRUBAN, [1909] 1 Ch. 413; [78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151—Eve, J.]**

**104. Divulging Employer's Secrets—Implied Term of Employment—Injunction.**—The principle on which the Court acts in restraining an employee from divulging matters relating to his employer's business is that there is an implied term in the contract of employment not to use to the employer's detriment information obtained in the course of the employment.

**KIRCHNER & Co. v. GRUBAN, [1909] 1 Ch. 413; [78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151—Eve, J.]**

**105. Contract of Employment—Breach—Dispute—Subsisting Claims—Adjustment and Set-off—Justices' Jurisdiction—Employers and**

**Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 3 (1).—**

The respondents summoned the appellant under the Employers and Workmen Act, 1875, claiming damages for a breach of contract by the appellant, and further claiming that the wages due to the appellant from the respondents be ascertained, and that the respective claims for damages and for wages be adjusted and set off by the Court. The claim for damages arose from the fact that the appellant and other workmen absented themselves from work without leave, whereby the respondents' colliery was stopped for the day. The magistrate found that there had been a breach of contract by the appellant, and he awarded the respondents 5s. 9d. damages and 5s. 6d. costs. He further found that £1 15s. 8d. was due to the appellant for wages and was payable on the following Saturday. No request or application for payment had been made by the appellant. The magistrate set off the damages and costs against this sum.

**HELD** (Darling, J., dissenting)—that there was a dispute between the employers and the workman, and that there were subsisting claims between them which the magistrate had power to adjust and set off under sect. 3 (1) of the Act.

**KEATES v. LEWIS MERTHYR CONSOLIDATED [COLLIERIES, LD., 73 J. P. N. C. 624; 128 L. T. Jo. 152—Div. Ct.]**

## IV. DISMISSAL.

**106. Wrongful Dismissal—Right of Servant to Totally Repudiate Contract, including Covenant in Restraint of Trade.**—Where a servant is wrongfully dismissed without his service being terminated by giving the agreed notice, he may treat the contract as entirely at an end, whilst retaining his right to sue his master for wrongful dismissal, and may ignore a covenant in the contract restraining him from trading on the termination of his engagement.

Decision of C. A. ([1908] 1 Ch. 537; 77 L. J. Ch. 411; 98 L. T. 482; 24 T. L. R. 285; 52 Sol. Jo. 240) affirmed.

**GENERAL BILL-POSTING CO. v. ATKINSON [1909] A. C. 118; 78 L. J. Ch. 77; 99 L. T. 943; 25 T. L. R. 178—H. L.]**

**107. Power to Dismiss on 14 Days' Notice—Dismissal on Payment of 14 Days' Wages in Lieu of Notice.**—The plaintiff was a servant of the defendant company under a contract which could be terminated by a fortnight's notice. He was also the secretary of a branch of the Amalgamated Society of Railway Servants. In that capacity he wrote a letter to another employé of the defendants, requiring him to apologise for an accusation of theft he had made against a fellow servant, who was also a member of the branch of the Amalgamated Society of Railway Servants. For writing this letter the plaintiff was dismissed by the defendants and was given 14 days' wages in lieu of notice. In an action claiming damages for wrongful dismissal:—

**HELD**—that the action failed and that the

## IV. Dismissal—Continued.

defendants were justified in dismissing the plaintiff.

AUSTWICK v. MIDLAND RY. CO., 25 T. L. R. [728—Grantham, J.]

**108. Wrongful Dismissal—Measure of Damages—Circumstances of Harshness—Exemplary Damages.**—In a case of wrongful dismissal it is beyond the competence of a jury to give “exemplary” or “vindictive” damages, or to take into consideration in assessing damages any circumstances of harshness or oppression accompanying the dismissal, or any loss sustained by the plaintiff from discredit thrown upon him by the manner of his dismissal, Lord Collins dissenting on this point.

*Maw v. Jones* (1890) 25 Q. B. D. 107; 59 L. J. Q. B. 542; 63 L. T. 347; 54 J. P. 727; 38 W. R. 718—C. A.) discussed.

Decision of C. A. (which proceeded on other grounds) reversed.

ADDIS v. GRAMOPHONE CO., LD. [1909] A. C. [488; 78 L. J. K. B. 1122; 101 L. T. 466—H. L.]

**109. Construction of Bridge under Local Act—Ferryman—Abolition of Office—Compensation—Littlehampton Urban District Council (Arun Bridge) Act, 1905 (5 Edw. 7, c. clxxx.), s. 6 (6).** A local Act of Parliament passed for the purpose of enabling the defendants to construct a bridge over the river Arun and to acquire the ferry rights over the river from certain trustees stipulated that the defendants should pay compensation to any servants in the regular employment of the trustees who should not be retained in the same or similar employment, and at the salary and on the terms and conditions in, at, and on which they were employed by the trustees at the date of the execution of the contract for the construction of the bridge in respect of any loss of office or diminution of salary by reason of the transfer of the undertaking by the trustees to the defendants.

The plaintiffs, who had been in the employment of the trustees as ferrymen, were, on the transfer of the ferry undertaking, continued by the defendants in the same employment and at the same salary for two years until the completion of the bridge, when they were dismissed by the defendants without notice.

HELD—that the plaintiffs were entitled to the same notice as the trustees would have been bound to give them or to wages in lieu of notice, but that they were not entitled to compensation under the Act.

Decision of Bucknill, J., affirmed.

LATTER v. LITTLEHAMPTON URBAN DISTRICT COUNCIL, 101 L. T. 172; 73 J. P. 426—C. A.

**110. Notice Terminating Employment—Wages not Paid Immediately on Expiration of Notice—Damages for Delay in Payment.**—The plaintiff was employed as a bricklayer by the defendants. He was working on night shift, and one morning at 5 a.m. he was told that his employment would end at 6 a.m. At 6 a.m. he went to the defend-

ants’ office to obtain the wages due to him, but as there was no one there at that time to pay him, he waited on till 10.45 a.m., when he received payment. In an action by him against the defendants to recover for loss of time, owing to the delay in paying the wages due to him, evidence was given that it was usual to pay the workman’s wages at the expiration of the hour’s notice given to them, so that they might be able to apply for another job immediately.

HELD—that there was no evidence from which a contract could be implied by the defendants to pay the plaintiff for waiting for his wages, and that the plaintiff, even if he had any right to nominal damages for the delay in payment, had sacrificed that right by accepting payment of a debt before action.

HARPER v. LINTHORPE DINSDALE SMELTING [Co., LD., 101 L. T. 608; 26 T. L. R. 32—Div. Ct.]

## V. WAGES : TRUCK ACTS.

[No paragraphs in this vol. of the Digest.]

## VI. SEDUCTION OF SERVANT.

[No paragraphs in this vol. of the Digest.]

## VII. APPRENTICES.

[No paragraphs in this vol. of the Digest.]

## MAYOR.

See MUNICIPAL CORPORATION ; ELECTIONS.

## MAYOR’S COURT.

See COURTS ; TIME, No. 3.

## MEDICINE AND PHARMACY.

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See also FOOD AND DRUGS ; REVENUE, No. 8.

## I. MEDICAL PRACTITIONERS.

See also MASTER AND SERVANT, No. 101.

**1. Unqualified Person—Prosecution by Private Person—Medical Act, 1858 (21 & 22 Vict. c. 90),**



### I. Medical Practitioners—Continued.

ss. 40, 42.]—A private person can institute a criminal prosecution under the Medical Act, 1858, and not only the General Medical Council of Education and Registration.

CLARKE v. MCGUIRE [1909] 2 I. R. 681; 43 [I. L. T. 52—Div. Ct., Ireland.

## II. DENTISTS.

### (a) Unregistered Persons.

2. *Description Implying that Person is Registered or Specially Qualified to Practise Dentistry*—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3—Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26.]—Inasmuch as the Dentists Act, 1878, does not make it illegal for an unqualified person to practise dentistry, it is not illegal for him to announce that he does so.

The defendants, who were not registered under the Dentists Act, 1878, affixed the following notice on their premises: "Bellerby, Heyworth, and Bowen. Finest artificial teeth. Painless extraction. Advice free. Mr. Heyworth attends here."

HELD—that such notice did not imply that the defendants were registered under the Dentists Act, 1878, or that they were persons specially qualified to practise dentistry; and therefore that it did not constitute a contravention of sect. 3 of that Act.

*Emslie v. Paterson* ((1896), 24 R. (Ct. of Sess.) 77) approved and followed. *Barnes v. Brown* (*infra*) overruled.

BELLERBY v. HEYWORTH AND BOWEN, [1909] 2 Ch. 23; 78 L. J. Ch. 666; 101 L. T. 254; 73 J. P. 361; 25 T. L. R. 591; 53 Sol. Jo. 576 —C. A.

2a. *Description Implying Special Qualification to Practise Dentistry*—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3—Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26.]—The words "specially qualified to practise dentistry" in sect. 3 of the Dentists Act, 1878, refer to special personal qualifications to practise dentistry and not to the special qualifications or "professional hallmarks" mentioned in other sections of the Act.

The appellant, who was not registered under the Dentists Act, 1878, and was not a legally qualified medical practitioner, was convicted for having unlawfully taken and used an addition or description—namely, "H. J. Barnes. Finest artificial teeth at moderate prices. Extractions, advice free. Hours 10-7. English and American teeth. Advice free. Painless extractions," implying that he was specially qualified to practise dentistry. The foregoing description was on the inner door and windows of the appellant's premises, and his room was fitted as a dentist's operating room. The appellant admitted that he carried on a dentist's practice there, but he did not take or use the name or title "Dentist," either alone or otherwise, or that of "Dental Practitioner."

HELD—that there was evidence to support the magistrate's finding that the appellant had

committed an offence against sect. 3 of the Dentists Act, 1878.

BARNES v. BROWN, [1909] 1 K. B. 38; 78 [L. J. K. B. 39; 99 L. T. 801; 72 J. P. 485; 25 T. L. R. 3; 53 Sol. Jo. 14—Div. Ct.

Overruled by *Bellerby v. Heyworth and Bowen*, *supra*.

### (b) Dental Companies.

3. *Name Struck off Dentists' Register—Company formed to carry on Business—Perpetual Injunction*—Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3.]—A company was formed to carry on the business of a man whose name had been struck off the Dentists' Register. An action was brought under sect. 3 of the Dentists Act, 1878, at the instance of the British Dental Association to restrain the company from representing that they were carrying on the business of a dentist or that they were dentists or persons specially qualified to practise dentistry or that they were registered under the Act.

HELD—that the company could be restrained because it was exceeding its powers, and that a perpetual injunction should be granted in the terms of sect. 3 of the Dentists Act, 1878.

ATT.-GEN. v. GEORGE C. SMITH, LD., [1909] 2 [Ch. 524; 78 L. J. Ch. 781; 100 L. T. 225; 25 T. L. R. 257—Eady, J.

### (c) In General.

[No paragraphs in this vol. of the Digest.]

## III. VETERINARY SURGEON.

[No paragraphs in this vol. of the Digest.]

## IV. SALE OF POISONS.

[No paragraphs in this vol. of the Digest.]

## V. CHEMISTS.

4. *Pharmaceutical Chemist—Unregistered Person—Use of Sign Suggesting Registration*—Pharmacy Act, 1852 (15 & 16 Vict. c. 56), s. 12.]—Sect. 12 of the Pharmacy Act, 1852, provides that after the passing of the Act it shall not be lawful for any person not being duly registered as a pharmaceutical chemist to assume or use the title of pharmaceutical chemist or pharmacist, or to assume, use or exhibit any name, title, or sign implying that he is registered under the Act, or that he is a member of the society, under a penalty of £5. M. kept a drug shop, at which he sold medicines, and over the premises and upon the labels on the bottles of medicine supplied by him appeared the words, "R. Mercer & Co., The Pharmacy, Haydock."

HELD—that M. had not committed an offence under sect. 12 of the Pharmacy Act by using a sign implying that he was registered under the Act or was a member of the Pharmaceutical Society.

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN [v. MERCER, [1909] W. N. 213; 101 L. T. 635; 26 T. L. R. 35; 54 Sol. Jo. 33—Div. Ct.

**MEETINGS.***See COMPANIES; CRIMINAL LAW.***MEMORANDUM OF ASSOCIATION.***See COMPANIES.***MERCANTILE AGENT.***See AGENCY.***MERCHANDISE MARKS.***See TRADE MARKS AND DESIGNS.***MERCHANT SHIPPING.***See SHIPPING AND NAVIGATION.***MERGER.***See MORTGAGES; REAL PROPERTY AND CHATTELS REAL.***MESNE PROFITS.***See LANDLORD AND TENANT; MORTGAGES; REAL PROPERTY AND CHATTELS REAL.***METROPOLIS.**

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*See also COMPULSORY PURCHASE, No. 8; WATERS, No. 10.***I. BUILDINGS.****(a) In General.**

1. *Building Notice*.—*School - Public Building*—*London Building Act, 1894* (57 & 58 Vict. c. ccxiii., ss. 145, 201.)—The London County Council as the local education authority under the Education Acts commenced to erect school buildings. The plans and specifications of the buildings were duly approved by the Board of Education, but no building notice under the London Building Act, 1894, was served upon the district surveyor.

**HELD**—that in respect of the buildings in question the London County Council were not

## I. Buildings—Continued.

exempt from the obligation of serving a building notice upon the district surveyor.

LONDON COUNTY COUNCIL *v.* DISTRICT SURVEYORS' ASSOCIATION AND WILLIS, [1909] 2 K. B. 138; 78 L. J. K. B. 729; 100 L. T. 890; 73 J. P. 291; 25 T. L. R. 163; 7 L. G. R. 569—Div. Ct.

### (b) Building Line.

#### (1) In General.

**2. Certificate of Superintending Architect—Appeal to Tribunal of Appeal—Powers of Tribunal—Previous Certificate in Existence not Appealed Against—** *Res Judicata—London Building Act, 1894* (57 & 58 Vict. c. cxxiii.), ss. 22, 24, 25, 182.]—Where a certificate, which has not been appealed against, has been given by the superintending architect of metropolitan buildings, the general line of building in a street so defined is (in the absence of evidence of buildings having been since erected that had altered or might alter the line of buildings) *res judicata*, and the tribunal of appeal has no power to define a line differing from it.

Decision of C. A. (98 L. T. 110; 72 J. P. 41; 6 L. G. R. 126) affirmed.

LILLEY AND LILLEY AND SKINNER, LD. *v.* [LONDON COUNTY COUNCIL, 100 L. T. 709; 73 J. P. 297; 53 Sol. Jo. 429; 7 L. G. R. 675—H. L.]

#### (2) Projecting Structures.

**3. Shops Erected Beyond General Building Line—Consent of Metropolitan Board of Works before 1894—Alteration of Building Line—Metropolis Management Amendment Act, 1862** (25 & 26 Vict. c. 102), s. 75—*London Building Act, 1894* (57 & 58 Vict. c. cxxiii.), ss. 22, 27, 216.]—Along part of the E. road were houses built before 1862, in front of which there had been erected since 1862 one-storey shops projecting as far as the pavement line of the road. The consent of the Metropolitan Board of Works, as required by the Metropolis Management Amendment Act, 1862, had been obtained for the erection of some of these; as to one of the others, the consent of the Board had been refused; and as to the rest there was no evidence that the consent of the Board had been obtained for. No attempt had been made to obtain the removal of the latter under the Act of 1862, which provided for the demolition of such structures if erected without proper consent. The Act of 1862 was repealed by the London Building Act, 1894, which enacted by sect. 27 that the consent of the London County Council to any building beyond the general line of buildings should not be deemed to alter the existing general line of buildings, and by sect. 216 that all consents given under the repealed Acts should have the same validity and effect as consents under that Act. The superintending architect certified the general line of buildings to be the frontage of the old houses. The tribunal of appeal defined the general line of buildings as the frontage of the projecting shops.

HELD (Bigham, Pres., dissenting)—that the tribunal of appeal were wrong in law in having regard to the existence of the projecting shops, and that the general line of buildings was the frontage of the old houses, as defined in the certificate of the superintending architect.

Decision of Div. Ct. ([1909] 1 K. B. 116; 78 L. J. K. B. 72; 99 L. T. 819; 72 J. P. 519; 53 Sol. Jo. 48; 7 L. G. R. 111) reversed.

LONDON COUNTY COUNCIL *v.* METROPOLITAN [RY. CO. AND OTHERS, [1909] 2 K. B. 317; 78 L. J. K. B. 830; *sub nom.* FLEMING *v.* LONDON COUNTY COUNCIL; 101 L. T. 323; 73 J. P. 339; 53 Sol. Jo. 558; 7 L. G. R. 720—C. A.]

### (c) "Building or Structure."

**4. Reservoirs—Notice to District Surveyor—Supervision—Right to Fees—Southwark and Vauxhall Water Act, 1894, s. 5—London Building Act, 1894, ss. 138, 154 (1)—Metropolitan Water Board Act, 1906, s. 4.]**—The appellants, who were a firm of builders, had constructed two covered storage reservoirs on behalf of the Metropolitan Water Board, under the authority of the Southwark and Vauxhall Water Act, 1894, s. 5, and the Metropolitan Water Board Act, 1906, s. 4. The respondent was the district surveyor appointed to the district of Camberwell, in which the reservoirs were situate. Before commencing the work the appellants gave notice to the respondent as required by sect. 145 of the London Building Act, 1894, that they were about to carry out the same. The respondent surveyed the premises in the ordinary course of his duties during the two years they were in course of construction.

HELD—that the reservoirs were buildings or structures to which the duties of the district surveyor extended within the London Building Act, 1894, and as the district surveyor had performed the duty of surveying them during their construction, he was entitled to his fees under sect. 154 (1) of the London Building Act, 1894.

MORAN *v.* MARSLAND, [1909] 1 K. B. 744; 78 [L. J. K. B. 346; 100 L. T. 374; 73 J. P. 114; 25 T. L. R. 235; 7 L. G. R. 493—Div. Ct.]

### (d) Nature of Buildings.

#### (1) In General.

[No paragraphs in this vol. of the Digest.]

#### (2) Dwellings for Working Classes.

[No paragraphs in this vol. of the Digest.]

### (e) Height of Buildings.

[No paragraphs in this vol. of the Digest.]

### (f) Dangerous, Defective, Temporary, and Wooden Structures.

**5. Dangerous Structure—"Owner"—Bridge over Canal—Bridge Constructed under Statutory Obligation to Carry Footpath over Canal—Bridge Subsequently Enlarged to Carry Carriage Traffic by Adjoining Owner under Local**



### I. Buildings—Continued.

*Agreement—Whether Canal Company "Owners" —Regent's Canal Act, 1812 (52 Geo. 3, c. excv.), ss. 76, 78, 79—London Building Act, 1894 (57 & 58 Vict. c. cxxiii.), ss. 5, 106, 107.]*—By the Regent's Canal Act, 1812, which authorised the appellant company to construct a canal, the company were required (sect. 76), where they cut through a highway, to make and maintain a bridge to carry the highway across the canal, and also to make and maintain bridges for the benefit of adjoining owners. Sect. 79 further provided that the owners of lands through which the canal was constructed might, with the consent of the company, provide additional bridges at their own expense.

In 1819 the company cut through a public footpath, and erected a bridge to carry such footpath across the canal. This bridge was admitted by the company to have been their property and repairable by them. In 1858 a landowner, under an agreement with the company which had been lost, substituted a larger bridge for the one constructed in 1819. There was no evidence of the contents of the lost agreement.

The bridge became dangerous, and the London County Council served a dangerous structure notice on the company under sect. 106 of the London Building Act, 1894, requiring them to take down or secure the bridge. The company failed to comply with such notice, and the council thereupon applied to a magistrate under sect. 107 of the Act of 1894 for an order requiring the company as "owners" of the bridge to take it down or secure it. The magistrate held that the company were the "owners" of the bridge and made the order asked for, but stated a case for the opinion of the High Court.

HELD—that the magistrate was right in holding that the company were the "owners" of the bridge within the meaning of sect. 5 of the London Building Act, 1894.

REGENT'S CANAL AND DOCK CO. v. LONDON [COUNTY COUNCIL, 73 J. P. 276; 7 L. G. R. 680—C.A.]

#### (g) Party Walls.

[No paragraphs in this vol. of the Digest.]

### II. BYE-LAWS.

#### (a) Betting in Streets.

[No paragraphs in this vol. of the Digest.]

#### (b) Lavatories and Water-closets.

[No paragraphs in this vol. of the Digest.]

#### (c) Lights on Vehicles.

[No paragraphs in this vol. of the Digest.]

#### (d) Lodging-houses.

6. *Validity of Bye-law requiring Landlord to Cleanse House—No Right of Landlord to Enter—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 94, 116.]*—A bye-law was made by a metropolitan borough council under sect. 94 of the Public Health (London) Act, 1891, in the following terms:—"Subject to the provisions

of these bye-laws, the landlord of a lodging-house shall, in the month of April, May, or June, in every year, cause every part of the premises to be cleansed"; and "landlord" was defined as meaning the person for the time being receiving the rack rent of the lodging-house, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack rent. The appellant, who was the owner of a lodging-house which was let to a tenant, was convicted of having failed to comply with the bye-law as to cleansing the lodging-house. The appellant had no right to enter on the premises.

HELD—that the conviction must be quashed as the bye-law was unreasonable, inasmuch as it required the landlord of the lodging-house to cause the work of cleansing to be done although he might not be able to do this without committing a trespass.

ARLIDGE v. ISLINGTON BOROUGH COUNCIL. [1909] 2 K. B. 127; 78 L. J. K. B. 553; 100 L. T. 903; 73 J. P. 301; 25 T. L. R. 470; 7 L. G. R. 649—Div. Ct.

### III. DRAINAGE.

#### (a) Drain or Sewer.

[No paragraphs in this vol. of the Digest.]

#### (b) In General.

7. *Bye-law Requiring Two Untrapped Openings—Requirement of Additional Vent Pipe—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 73, 74, 76.]*—The appellant was summoned by the respondents, the Westminster Corporation, for non-compliance with bye-law 8 of the bye-laws made by the London County Council under sect. 202 of the Metropolis Management Act, 1855, which requires that every person who shall erect a new building shall provide at least two untrapped openings to the drains, one on the house side of the trap which has to be placed between the drain of the building and the sewer, and the other as far distant from the first opening as may be practicable.

He was also summoned for non-compliance with an order of the respondents made under sect. 74 of the Metropolis Management Act, 1855, for the drainage of the premises in question by a combined operation. The order provided that it was made subject to the provision of an additional vent pipe to be taken above the roof of one of the premises. The vent pipe was the same thing as the untrapped outlet opening required by bye-law 8 above referred to. The appellant contended that he was not bound to provide this additional vent pipe on the grounds that it was not within the words "other connected works and apparatus" in sect. 76 of the above Act, and that the respondents had no power to make a requirement dealing with a matter regulated by the bye-laws of the London County Council and going beyond those bye-laws.

HELD—that though the appellant had in fact provided the two untrapped openings required by the bye-law, the respondents had

### III. Drainage—Continued.

power to require by their order the provision of the additional vent pipe, and that the order was binding on the appellants.

LORDEN v. WESTMINSTER CORPORATION, 73 [J. P. 126; 7 L. G. R. 446—Div. Ct.]

8. *Sewage Storm-water Outlets—Discharge into Tidal Navigable Creek—Infringement of Private Rights—Injunction—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 135—Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), ss. 1, 2, 24.*—The plaintiffs were the owners of the foreshore and bed of a tidal navigable creek in the river Thames, and also of the land on each side of the creek, and used the creek for loading and unloading their barges in carrying on their business in the factories on the land.

In 1855 a stream called the Falcon Brook, which discharged into the creek, had become an open sewer and was by the Metropolis Management Acts, 1855, vested as a sewer in the Metropolitan Board of Works, the predecessors of the defendant council. About 1865 the Board, under the powers of the Metropolis Management Acts, 1855 and 1858, covered in the Falcon Brook and connected it with their main lower level sewer so that it discharged into that sewer and no longer flowed into the creek, but an outlet into the creek was made at the point of connection and was controlled by a penstock. In 1907 the defendant council, in order to relieve the pressure in the low level sewer arising from storm-water in times of heavy rainfall, constructed a pumping station at the outlet, and, when the necessity arose, pumped the storm-water into the creek and so into the Thames. The storm-water was full of sewage and caused a serious nuisance to the plaintiffs, who claimed an injunction to restrain the continuance of the nuisance. The defendant council contended that the pumping station was properly constructed under their statutory powers as part of their main drainage system, that they had acted reasonably, and that an injunction would not lie.

HELD—that there was nothing in the said Acts which authorised the defendants to discharge storm-water into the creek, and that the plaintiffs were entitled to the injunction on the ground of a nuisance, and, *semble*, also on the ground of trespass.

Decision of Neville, J., (72 J. P. 315; 24 T. L. R. 607) affirmed.

PRICE'S PATENT CANDLE CO., LD. v. LONDON COUNTY COUNCIL, [1908] 2 Ch. 526; 78 L. J. Ch. 1; 72 J. P. 429; 99 L. T. 571; 24 T. L. R. 822; 7 L. G. R. 84—C. A.

9. *Mode of Drainage—Deposit of Plans—Liability of Person doing the Work—Bye-laws—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 76, 202—Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40 (8).*—The respondent was summoned under certain bye-laws made by the London County Council in virtue of sect. 202 of the Metropolis Management Act, 1855, as applied by sect. 40 (8) of the Local Government Act, 1888, (1) for not executing certain works of

re-drainage in the manner prescribed by the bye-laws, and (2) for not depositing plans of the alteration as required by the bye-laws. The respondent was a plumber and was employed by the owner of a house, who was a builder, to execute certain sanitary works. The works executed by the respondent included the works complained of, and were in fact done by a son of the respondent. Prior to executing the works the respondent did not deposit the plans required by the bye-laws. The bye-laws were expressed to apply to any person who should construct or reconstruct any drain or apparatus connected therewith.

HELD—on the facts, that as there was nothing to show but that the respondent was merely carrying out the orders given him by the owner of the house, the respondent could not be convicted.

KERSHAW v. BROOKS, [1909] 2 K. B. 265; 78 [L. J. K. B. 736; 100 L. T. 853; 73 J. P. 231; 7 L. G. R. 578—Div. Ct.]

### IV. HACKNEY CARRIAGES.

10. *Motor Cab—Regulation of Commissioner of Police—Liability to Penalty—London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), s. 29—London Hackney Carriages Act, 1850 (13 & 14 Vict. c. 7), ss. 4, 8—London Hackney Carriage Act, 1853 (16 & 17 Vict. c. 33), ss. 19, 21.*—The respondent, who was a motor cab driver, was summoned for wilfully disregarding a regulation made by the Commissioner of Metropolitan Police that the first two drivers of motor cabs at a standing must be with their cabs and be ready to be hired at once by any person. This regulation was made under sect. 4 of the London Hackney Carriages Act, 1850, but that section does not provide any penalty for breach of any regulation so made.

The London Hackney Carriage Act, 1853, provides by sect. 19 that for every offence against the provisions of this Act, for which no special penalty is appointed, the offender shall be liable to a penalty of 40s., and by sect. 21 that the Act is to be construed as one with the London Hackney Carriages Act, 1843, and the London Hackney Carriages Act, 1850.

HELD—that the effect of sects. 19 and 21 of the Act of 1853 was to create one code of law for the regulation of hackney carriages, that sect. 21 of the Act of 1853 was a general penalty section which would apply to a breach of any provision of the three Acts which was not specifically provided for elsewhere, and that a breach of regulations made under an Act was a breach of the Act itself, and that, therefore, if the offence was proved, the respondent was liable to the penalty provided by sect. 19 of the London Hackney Carriage Act, 1853.

WILLINGALE v. NORRIS, [1909] 1 K. B. 57; [78 L. J. K. B. 69; 99 L. T. 830; 72 J. P. 495; 25 T. L. R. 19; 7 L. G. R. 76—Div. Ct.]

### V. NUISANCES, etc.

#### (a) Offensive Trades.

(No parts appear in this Vol. of the 11, etc.)

## V. Nuisances—Continued.

## (b) Removal of Refuse.

11. "House Refuse"—"Trade Refuse"—*Refuse from Restaurant—Public Health (London) Act, 1891* (54 & 55 Vict. c. 76), ss. 30, 33, 141.]—The refuse of a restaurant, namely, ashes, clinkers, coffee grounds, egg shells, dust and general dirt, small quantities of broken crockery, tea leaves, potato parings, scrapings from the sink and sweepings from rooms, is "house refuse" within sect. 30 of the Public Health (London) Act, 1891, and not "trade refuse" within sect. 33.

If the refuse to be removed is "house refuse" in character, the mere fact that it has been produced in the carrying on of a trade does not make it "trade refuse."

*Westminster Corporation v. Gordon Hotels, Ltd.* ([1906] 2 K. B. 39; 75 L. J. K. B. 438; 94 L. T. 251; 22 T. L. R. 439; 4 L. G. R. 438—Div. Ct.) applied.

*J. Lyons & Co. v. Mayor, Etc., of London.* [1909] 2 K. B. 588; 78 L. J. K. B. 915; 101 L. T. 206; 73 J. P. 372; 25 T. L. R. 636; 7 L. G. R. 811—Div. Ct.

## (c) Smoke.

[No paragraphs in this vol. of the Digest.]

## (d) In General.

[No paragraphs in this vol. of the Digest.]

## VI. OFFICERS.

[No paragraphs in this vol. of the Digest.]

## VII. RATES.

See RATES, IV.

## VIII. SANITARY CONVENIENCES, WATER-CLOSETS, etc.

[No paragraphs in this vol. of the Digest.]

## IX. STREETS.

## (a) Breaking up.

[No paragraphs in this vol. of the Digest.]

## (b) Laying Out.

[No paragraphs in this vol. of the Digest.]

## (c) Obstruction.

12. *Complaint—Authority in Writing—Metropolitan Paving Act, 1817* (57 Geo. 3, c. xxix.), ss. 65, 123.]—Sect. 123 of the Metropolitan Paving Act, 1817, which empowers justices to proceed on the complaint of the persons having the control of the pavements or of any person appointed in writing for the purpose, does not apply to proceedings under sect. 65, which enables justices to entertain proceedings for street obstruction on the complaint of one or more credible witnesses, and therefore in proceedings under sect. 65 the complainant need not be authorised in writing to make the complaint.

*KEEP v. ALEXANDER*, 101 L. T. 430; 73 J. P. 423; 7 L. G. R. 894—Div. Ct.

13. *Accident—Repair of Carriage in a Thoroughfare—City Police Act, 1839* (2 & 3 Vict. c. xciv.), s. 35 (1).]—The City Police Act, 1839, sect. 35 (1), subjects to a penalty any person who, within the City of London, shall, in any thoroughfare to the annoyance of the inhabitants or passengers, repair any part of any carriage, except in cases of accident where repair on the spot is necessary. A motor omnibus broke down in a street in the City of London, and, being unable to proceed by means of its own mechanism, was pushed into Walbrook, where the appellant repaired it. Evidence was adduced that annoyance and inconvenience had been suffered owing to the omnibus being so repaired. It was also proved that the breakdown was due to an accident, and that the repair was necessary to enable it to proceed under its own mechanism. The appellant was convicted.

**HELD**—that as the omnibus had been removed before being repaired, and having been moved so far could have been moved further, the appellant could not rely on the provision excepting cases of accident where repair on the spot is necessary, and therefore he had committed the offence charged.

*CHAPMAN v. RAWLINGS*, 101 L. T. 605; 73 J. P. 512; 26 T. L. R. 15; 54 Sol. Jo. 49; 7 L. G. R. 1153—Div. Ct.

## (d) Paving and Making up.

[No paragraphs in this vol. of the Digest.]

## (e) Widening.

14. *Notice to Treat—Repudiation as to Part—Withdrawal—Revival of Previous Notice—Notice to Acquire Reversion without Leasehold Interest—Metropolis Paving Act (Michael Angelo Taylor's Act), 1817* (57 Geo. 3, c. xxix.), ss. 80, 82.]—A notice to treat served under sect. 80 of Michael Angelo Taylor's Act operates as a contract so as to fix the subject-matter of the notice, and the person upon whom it is served must either accept it as a whole or repudiate it altogether, and if he repudiates it, those serving the notice can withdraw it.

Decision of *Eve, J.*, ([1909] 2 Ch. 287; 78 L. J. Ch. 633; 100 L. T. 925; 73 J. P. 364; 25 T. L. R. 622; 53 Sol. Jo. 561; 7 L. G. R. 733) affirmed.

*WILD v. WOOLWICH BOROUGH COUNCIL*, [1909] [W. N. 217; 101 L. T. 58; 26 T. L. R. 67; 54 Sol. Jo. 64—C. A.]

## (f) In General.

[No paragraphs in this vol. of the Digest.]

## X. WATER SUPPLY.

15. *Affixing Pipe—No Consent by Water Board—Adjoining Houses—Waterworks Clauses Act, 1863* (26 & 27 Vict. c. 93), s. 19—*Regulations under the Metropolitan Water Act, 1871* (34 & 35 Vict. c. 113), s. 17.]—The appellant was summoned by the Metropolitan Water Board for unlawfully affixing a pipe to the communication or service pipe at No. 40, D. Street, without the consent of the respondents, contrary to sect. 19 of the Waterworks Clauses Act, 1863. It was



**X. Water Supply—Continued.**

proved that the appellant was the owner of Nos. 40 and 42, D. Street, which adjoined one another, and formed part of a continuous row of houses. Originally each house had a separate communication pipe, and had been supplied by the respondents with water direct from the main, but owing to the appellant not having remedied certain defects in the fittings at No. 42, the respondents cut off the supply from No. 42 at a time when the house was unoccupied. The appellant then, without the consent of the respondents, affixed the pipe within No. 42 to that within No. 40, thus making one communication pipe for the two houses. The respondents had demanded the water rate from the appellant for the period in question, but on the day of the hearing of the summons it had not been paid. The appellant relied upon No. 5 of the regulations made under sect. 17 of the Metropolis Water Act, 1871, which regulation provides that as far as is consistent with the special Acts of the company, in the case of a group or block of houses the water rates of which are paid by one owner, the owner may, at his option, have one sufficient communication pipe for such group or block.

**HELD**—that the above regulation was no justification for the appellant having taken the law into his own hands, and that he had committed the offence charged.

**KYFFIN v. METROPOLITAN WATER BOARD**, 99 [L. T. 809; 72 J. P. 517; 7 L. G. R. 15—Div. Ct.]

**16. "Domestic Purposes"—Trade Purposes—Business Premises—Metropolitan Water Board (Charges) Act, 1907** (7 Edw. 7, c. clxxi.), ss. 8, 9, 13, 16, 25.]—A supply of water to business premises is a supply for "domestic purposes" within the meaning of sect. 25 of the Metropolitan Water Board (Charges) Act, 1907, if the water is used for domestic as distinguished from business purposes.

Water was supplied by the defendants to the plaintiffs, a gas company, who had large premises. No one slept or resided on the premises, nor was any part of the premises charged with the payment of inhabited house duty. The plaintiffs had a large number of employees, for whose use they had to supply sanitary conveniences, and in addition thereto a number of taps for the supply of water for the purposes of washing or drinking. The water so supplied was solely used by those employees while engaged in carrying on the plaintiffs' trade and business. For their manufacturing purposes the plaintiffs drew a supply of water from a stream that flowed through their premises.

**HELD**—that the water supplied by the defendants to the plaintiffs was for "domestic purposes" within sect. 25 of the Metropolitan Water Board (Charges) Act, 1907, and that payment therefor must be made on that footing, subject to the rebate allowed by sect. 9 of the Act.

**SOUTH SUBURBAN GAS CO. v. METROPOLITAN [WATER BOARD]**, [1909] 2 Ch. 666; 101 L. T. 560; 26 T. L. R. 12; 73 J. P. 503—Neville, J.

**XI. MISCELLANEOUS.**

[No paragraphs in this vol. of the Digest.]

Y.D.

**MIDWIVES.**

See PUBLIC HEALTH.

**MILITIA.**

See ROYAL FORCES.

**MILK.**

See FOOD AND DRUGS.

**MINES, MINERALS, AND QUARRIES.**

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**I. MINING LEASE.**

**1. Covenant Running with the Land—Covenant to Pay Compensation for Damage by Workings—Covenant to Pay to Persons not Parties to Lease—Owners for Time Being—Heirs and Assigns of Original Owners—Real Property Act, 1845** (8 & 9 Vict. c. 106), s. 5—*Conveyancing Act, 1881* (44 & 45 Vict. c. 41), s. 58.]—By a covenant in a lease from the owners of the coal under certain land the lessee (which term was to include his executors, administrators, and assigns) covenanted "with the lessors and as separate covenants with others the owners or owner, occupiers or occupier, for the time being of the said lands hereinbefore described, or any part thereof . . . to pay or cause to be paid to the said lessors or other the covenantees or covenantee, compensation for damage or injury whatsoever that hath already been or shall hereafter be done or occasioned by the said lessee in or by reason of the winning or working of the mines or seams of coal." The "others," i.e., the surface owners, were not parties to the lease. The working having caused damage to the surface, the trustees under the will of one of the original surface owners and the assigns of another original surface owner claimed compensation under the covenant in the lease from the lessee's assigns (who were in liquidation) and his executors.

**HELD**—that, although the surface owners were not parties to the lease, the benefit of the covenant ran with the land by virtue of sect. 5 of the Real Property Act, 1845; that, as it

### I. Mining Lease—Continued.

related to land, it must be deemed to have been made with the "heirs and assigns" of the original surface owners, who were included in the term "owners for the time being" and were therefore existing persons at the date of the lease; and that therefore all the surface owners or their devisees or their successors in title could recover.

Decision of *C. A. (sub nom. Forster v. Elvet Colliery Co.; Quinn v. Elvet Colliery Co.; Seed v. Elvet Colliery Co.; Morgan v. Elvet Colliery Co.)*, [1908] 1 K. B. 629; 77 L. J. K. B. 521; 98 L. T. 736; 24 T. L. R. 265; 52 Sol. Jo. 224 affirmed.

*DYSON v. FORSTER; DYSON v. R. SEED, QUINN, [MORGAN, AND OTHERS, [1909] A. C. 98; 78 L. J. K. B. 246; 99 L. T. 942; 25 T. L. R. 166; 53 Sol. Jo. 149—H. L.*

### 2. Construction—Clause against Working Adjoining Minerals—Penalty for Contravention—Prohibition.

By an agreement made between the appellant, the proprietor of one portion of a coalfield which was worked by pits on his land, of the first part, and the respondents, the lessees of the coalfield, of the second part, it was provided that "The second parties hereby undertake and bind themselves and their foresaids that from and after the term of Whitsunday, 1893, they will work the coal in the adjoining properties only to such an extent as to enable them to pay to the several proprietors thereof such sums of lordship as will amount to, but not exceed, the fixed rents agreed by their several leases to be paid to such proprietors respectively, declaring that if in any year during the currency of this lease the sums payable to such adjoining proprietors shall exceed the said fixed rents, which amount to £550 per annum, then and in that event the second parties shall be bound, as they hereby agree and bind themselves and their foresaids, to pay to the first party and his foresaids the sum of one penny per ton on every ton of coal worked from the land of such adjoining proprietors in excess of the quantities necessary to make up or equal the said fixed rents payable to them as above mentioned: In consideration whereof the first party gives up and renounces from and after the term of Martinmas, 1888, the right to exact the wayleave of one penny per ton presently payable to him."

**HELD**—that the prohibition to work coal in the adjoining properties in excess of the agreed amount was absolute, and could not be contravened on payment of the one penny per ton.

Decision of the First Division of the Court of Session ([1908] 45 Sc. L. R. 290) reversed.

*FORREST AND OTHERS v. MERRY AND CUNING-  
[HAME, [1909] A. C. 417; 101 L. T. 138; 46  
[Sc. L. R. 789—H. L.*

**3. Covenant to Work and Get Coal—Working Becoming Unprofitable—Absolute Covenant to Work—Damages.**—By a mining lease certain seams of coal were demised to the defendants subject to the payment of certain royalties. The lessees covenanted that they would immediately, or as soon as might be after the demise, proceed

to open, get, and work the coal thereby demised without delay. Only part of the coal was worked by the defendants during the term.

**HELD**—that the defendants had broken the covenant and were liable in damages to the lessor.

*ECKENSLEY v. WIGAN COAL AND IRON CO., 54  
[Sol. Jo. 48—Eve, J.*

## II. MINING REGULATIONS.

### (a) Coal Mines.

*See MASTER AND SERVANT, No. 99.*

### (b) Fencing Abandoned Mines.

[No paragraphs in this vol. of the Digest.]

### (c) Quarries.

[No paragraphs in this vol. of the Digest.]

## III. RESERVATION OF MINERALS.

**4. China Clay—Purchase of Land by Railway Company for their Undertaking—Statutory Reservation of Minerals—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 79.]**—Kaolin, or china clay, where it does not constitute the land soil itself, is a mineral within the statutory reservation of minerals contained in sect. 77 of the Railways Clauses Consolidation Act, 1845.

*Lord Provost and Magistrates of Glasgow v. Farie* (13 App. Cas. 657; 58 L. J. P. C. 33; 37 W. R. 627; 60 L. T. 274—H. L.) distinguished.

Decision of *Eve, J.* (77 L. J. Ch. 673; 72 J. P. 457; 24 T. L. R. 804; 52 Sol. Jo. 683; [1908] W. N. 178) affirmed.

*GREAT WESTERN RY. CO. v. CARPALLA UNITED  
[CHINA CLAY CO., LD., [1909] 1 Ch. 218;  
78 L. J. Ch. 105; 99 L. T. 869; 73 J. P. 23;  
25 T. L. R. 91—C. A.*

Affirmed on appeal (54 Sol. Jo. 150; *Times*, Dec. 17th, 1909)—H. L.

**5. Meaning of "Minerals"—Sandstone—Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), ss. 70, 71.]**—"Sandstone" is not a "mineral" within the meaning of sect. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845.

Decision of Court of Session ([1909] S. C. 277; 46 Sc. L. R. 178) reversed.

*NORTH BRITISH RY. CO. v. BUDHILL COAL AND  
[SANDSTONE CO., [1909] W. N. 223; 101  
L. T. 609; 26 T. L. R. 79; 54 Sol. Jo. 79; 47  
Sc. L. R. 23—H. L.*

**6. Grant of Mines and Minerals—Whether Clay and Stone included.]**—The plaintiffs were the grantees from the defendants of a certain mine, vein, bed, or stratum of coal "and also all other mines, veins, beds, or strata of coal, ironstone, and pot pipe, and fire clay, and all other mines and minerals lying and being under" the defendants' land.

**HELD**—that clay which was not commercially workable and stone which was unfit for building

**III. Reservation of Minerals—Continued.**  
 purposes were not within the contemplation of the parties when the mines and minerals were granted, and did not pass to the plaintiffs.

GEORGE SKEY & CO., LD. *v.* PARSONS, 101 L. T. [103 ; 25 T. L. R. 708—Eady, J.]

#### IV. SUPPORT.

**7. Overlying and Underlying Seams—Right to Work all the Underlying Minerals—Implied Right to Support.**—A lease of certain strata of coal granted to the plaintiffs contained a reservation to the lessors entitling them to work, or permit to be worked, seams underlying those demised to the plaintiffs. At the time the lease to the plaintiffs was granted it was common knowledge to all persons conversant with mining that it would be impossible to work the lower seams without causing damage by subsidence to the upper seams.

**HELD**—that the reservation in the plaintiffs' lease permitting the working of the lower seams must be read with the necessary implication—viz., that such working would cause a corresponding subsidence in the upper seams; and, accordingly, that the defendants as lessees of the lower seams were entitled to work those seams, although by doing so they let down the overlying minerals.

Decision of Neville, J. ([1908] 2 Ch. 475; 77 L. J. Ch. 746; 24 T. L. R. 752) reversed.

BUTTERLEY CO., LD. *v.* NEW HUCKNALL [COLLIERY CO., LD., [1909] 1 Ch. 37; 78 L. J. Ch. 63; 99 L. T. 818; 25 T. L. R. 45; 53 Sol. Jo. 45—C. A.]

#### V. MISCELLANEOUS.

**8. Wrongful Working of Coal—Statute of Limitations—Constructive Possession.**—Where a mine owner wrongfully works coal for more than twelve years before action brought he acquires no title under the Statute of Limitations to the coal except to such as he has actually worked; and constructive possession of a wider area will only be inferred where the inference is necessary to give effect to contractual obligations or to preserve the good faith and honesty of a bargain.

GLYN *v.* HOWELL, [1909] 1 Ch. 666; 78 L. J. Ch. [391; 100 L. T. 324; 53 Sol. Jo. 269—Eve, J.]

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[No paragraphs in this vol. of the Digest.]

See also PLEADING, No. 1; STOCK EXCHANGE, No. 1.

#### 1. FRAUD.

**1. Fraudulent Judgment—Setting Aside by Third Party—Practice—Motion—When Court will Direct an Issue.**—On a motion by a judgment creditor to set aside a prior judgment obtained against the defendant, by which the remedies of the judgment creditor were prejudiced, on the ground that such judgment was obtained by fraud between the plaintiff and defendant for the purpose of defeating the claims of creditors of the defendant, the Court may in a clear case set aside the judgment, but will, where the facts are in dispute and the allegations of fraud denied by the plaintiff, order an issue to be tried between the judgment creditor and the plaintiff as to whether the judgment obtained by the plaintiff was wholly or in part fraudulent.

NIXON *v.* LOUNDES, [1909] 2 I. R. 1; 43 I. L. T. [15—Div. Ct., Ireland.]

#### II. MISREPRESENTATION.

##### (a) Fraudulent Misrepresentation.

**2. Contract Induced by Fraudulent Representation—Voidable, not Void—Election by Party Defrauded—Severability of Contract.**—A contract into which a person may have been induced to enter by false and fraudulent representation is not void, but merely voidable at the election of the person defrauded after he has had notice of the fraud. Unless and until he makes his election and by word or act repudiates the contract or expresses his determination not to be bound by it (which is but a form of repudiation), the contract remains as valid and binding as if it had not been tainted with fraud. The party defrauded cannot avoid one part of a contract and affirm another part unless the parts are so severable from each other as to form two independent contracts.

UNITED SHOE MACHINERY CO. OF CANADA *v.* [BRUNET AND OTHERS, [1909] A. C. 330; 73 L. J. P. C. 101; 100 L. T. 579; 25 T. L. R. 442; 53 Sol. Jo. 396—P. C.]

##### (b) Innocent Misrepresentation.

See also AGENCY, No. 1.

**3. Contract—Innocent Misrepresentation Acted on—Collateral Contract.**—An innocent misrepresentation on which a person acts is not by itself a sufficient ground on which that person may base a collateral contract.

MODERA *v.* BARTTELOT, *Times*, May 5th, 1909—C. A.]

##### (c) Misrepresentation as to the Nature of Documents.

[No paragraphs in this vol. of the Digest.]

## MISDEMEANORS.

See CRIMINAL LAW.

## MISREPRESENTATION AND FRAUD.

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## MISTAKE.

See also BANKERS. No. 9; EVIDENCE, No. 6; INCOME TAX, No. 6; REVENUE. No. 3; WILLS.

1. *Deed of Appointment—Earlier Appointment Forgotten—Forgetfulness a Ground for Relief—Rectification or Rescission.*—The plaintiff and her husband appointed in 1888 one-half of a trust fund to the elder of their two daughters on her marriage. Her husband being dead, the plaintiff, in 1902 appointed to the younger daughter £1,600 out of the trust fund, and in 1904 a further sum of £7,000. Later in 1904 the plaintiff, having forgotten the appointment in 1888 and desiring to put her two daughters on an equality, appointed the sum of £8,600 to her elder daughter. The trust fund amounted to £29,000. On her present solicitor's discovering the appointment of 1888, the plaintiff sought to have the appointment of 1904 to the elder daughter rescinded.

HELD—that the jurisdiction to grant relief on the ground of mistake extends to cases of mere forgetfulness, that the relief is not confined to rectification but extends to rescission, and that the deed of appointment of £8,600 must be rescinded.

LADY HOOD OF AVALON *v.* MACKINNON. [1909]

[1 Ch. 476; 78 L. J. Ch. 300; 100 L. T. 330; 25 T. L. R. 290; 53 Sol. Jo. 269—Eve, J.]

2. *Omission to Alter Printed Form of Tender—Plaintiff's Intention to Supply Article of His Own Manufacture.*—The plaintiff tendered on a printed form supplied by the defendants for the supply of a disinfectant. The tender was accompanied by a sample of the disinfectant labelled "Anite," which was the disinfectant manufactured by the plaintiff. By the printed form the defendants had asked for a tender for "Heydozone," and the plaintiff omitted to alter the "Heydozone" into the word "Anite." The defendants accepted the tender of the plaintiff for the supply of "Heydozone."

The plaintiff asked for a declaration that no contract existed between himself and the defendants, on the ground that there had been a mistake as to the disinfectant to be supplied.

HELD—that the plaintiff had failed to show that the defendants had misled him in any way, and that consequently the contract was binding on him.

JOHNSON *v.* GUARDIANS OF ST. MARY, ISLINGTON. [73 J. P. 172—Bray, J.]

3. *Money Paid under Mistake of Fact—Future Liability—No Legal Liability when Money Paid.*—By a standing agreement between the plaintiff and K. and Co., bankers in New York, a Mexican company was allowed to overdraw its account with K. and Co. up to £500, while the plaintiff, on being advised and as occasion required, paid £500 into K. and Co.'s account with the defendants in London. Accordingly the plaintiff having received a letter from K. and Co. on October 30th, instructed his bankers to pay £500 to the defendants to be paid to K. and Co.'s

credit, and this was done on October 31st. On October 30th K. and Co. stopped payment, but this fact was not known in England till after the £500 had been paid to the defendants by the plaintiff. Immediately on becoming aware of the stoppage of payment by K. and Co. the plaintiff applied to the defendants for repayment of the £500. K. and Co. were largely indebted to the defendants, and the latter, who had done no more than make an entry in their books of the receipt of the £500, claimed to retain that sum in reduction of K. and Co.'s indebtedness. The Mexican company's account with K. and Co. had not in fact been overdrawn.

HELD—that the £500 was paid by the plaintiff not under any legal liability to do so, but only in anticipation of a legal liability, and that as he had paid it under a mistake as to the true state of affairs he was entitled to recover it from the defendants, whose position was that of a mere conduit pipe.

KERRISON *v.* GLYN, MILLS, CURRIE & Co., [101 L. T. 675; 26 T. L. R. 37—Hamilton, J.]

4. *Voluntary Gift—Ignorance of Effect of Previous Settlement—Covenant to Settle After-Acquired Property—Revocation of Gift.*—A husband transferred securities of large value to his wife, intending them as a gift to her absolutely. When he made the gift he knew of his marriage settlement, but did not realise that the gift would come within the operation of a clause therein under which his wife covenanted to settle all after-acquired property. It having been decided that the gift came within the operation of that clause, the husband brought this action for the purpose of obtaining a revocation of the gift upon the ground that it was made under a mistake of fact.

HELD—that the gift being voluntary, and having been made under a mistake of fact, the husband was entitled to have it set aside.

ELLIS *v.* ELLIS, 26 T. L. R. 166—Warrington, J.]

5. *Estate of Arranging Debtor Sold to Creditors—Statement of Affairs—Accountant's Error.*—Where an innocent mistake is made in accountancy as to the premium payable on an insurance policy on the life of an arranging debtor taken over by two unsecured creditors who agree to stand in the shoes of the debtor, they are not entitled to compensation for the loss sustained by them by reason of the innocent mistake as against those creditors who have agreed to accept a composition.

IN RE AN ARRANGING DEBTOR, 43 I. L. T. 21—[C. A., Ireland.]

## MONEY AND MONEY-LENDERS.

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**II. LOANS BY MONEY-LENDERS.**

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**III. THE MONEY-LENDERS ACT, 1900.****(a) Scope of Act.**

1. *Contract for Loan made in India—Contract Intended to be Performed in India—Jurisdiction of Court in England—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1.*—Sect. 1 of the Money-lenders Act, 1900, does not apply to a contract made in India and intended to be performed there.

*Shrichand & Co. v. Lacon* ((1906) 22 T. L. R. 245) followed.

*VELCHAND v. MANNERS*, 25 T. L. R. 329—  
[Darling, J.]

**(b) Registration.**

2. *Taking Mortgage Otherwise than in Registered Name—Void Transaction—Right to a Declaration—Imposing Term of Repaying Money Advanced—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2.*—A money-lender, in the course of his business as such, took a mortgage as security for an advance otherwise than in his registered name. The mortgagor entered into a scheme of arrangement with his creditors which was approved by the Court, under which the plaintiff was appointed trustee, and one of the scheduled debts was that due upon the mortgage. The trustee brought an action for a declaration that the mortgage was void under sect. 2 of the Money-lenders Act, 1900.

**HELD**—that the Court would make a declaration to that effect, though no consequential relief was claimed; and, in making the declaration, it would not impose the condition that the mortgagor should repay the money advanced, inasmuch as the plaintiff was not claiming any equitable relief.

*Lodge v. National Union Investment Co.*, ([1907] 1 Ch. 300; 76 L. J. Ch. 187; 96 L. T. 301; 23 T. L. R. 187—Parker, J.) distinguished.

*Decision of Eve, J.* ([1908] 2 Ch. 612; 24 T. L. R. 795; 52 Sol. Jo. 661) affirmed.

*CHAPMAN v. MICHAELSON*, [1909] 1 Ch. 238; [78 L. J. Ch. 272; 100 L. T. 109; 25 T. L. R. 101—C. A.]

3. *Registered Address—Carrying on Business Elsewhere—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2.*—A registered money-lender lent the defendant sums of money on three different occasions, taking on each occasion a promissory note for the amount advanced. In each case the money was lent to, and the promissory note was given and signed by, the defendant at his residence. From the evidence it appeared that these were not isolated transactions, but were illustrative of the manner in which the plaintiff carried on his money-lending business.

**HELD**—that the transactions were void under sect. 2 (1) (b) of the Money-lenders Act, 1900.

*LAZARUS v. GARDNER*, 25 T. L. R. 499—Sutton, J.

Without argument, affirmed (25 T. L. R. 719) by C. A.

4. *Registered Address—Carrying on Business—Isolated Transaction Elsewhere—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2.*—Sect. 2 of the Money-lenders Act, 1900, requires a money-lender to carry on his business in his registered name and at his registered address and in no other name and at no other address; and it prevents him carrying out any single transaction in any other name or at any other address or place.

*Decision of Hamilton, J.*, reversed.

*GADD v. PROVINCIAL UNION BANK* (No. 1), [[1909] 2 K. B. 353; 78 L. J. K. B. 815; 101 L. T. 219; 25 T. L. R. 591—C. A.]

5. *Carrying on Business at Registered Address—Promissory Note Signed Elsewhere—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2.*—Two promissory notes were given by the defendants to the plaintiff, a registered money-lender, for an advance made by him to them. The notes were signed by one of the defendants at the plaintiff's registered address, but were signed by the other defendant elsewhere. The money advanced was handed over by the plaintiff at his registered address.

**HELD**—that the fact that the promissory notes were signed by one of the defendants elsewhere than at the plaintiff's registered address did not void the transaction under sect. 2 of the Money-lenders Act, 1900.

*LEVENE v. GARDNER AND THE EARL OF KILMOREY*, 25 T. L. R. 711—Phillimore, J.

6. *Carrying on Business at Registered Address—Cheque Posted to Borrower—Isolated Act—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2.*—The fact that a cheque for a loan was not handed over to the borrower at the money-lender's registered address but was sent by post, does not make the transaction void under sect. 2 of the Money-lenders Act, 1900.

### III. The Money-Lenders Act, 1900—Continued.

*Levene v. Gardner and Earl of Kilmorey* (*supra*) considered.

JACKSON *v.* PRICE AND ANOTHER. [1909] W. N. 262; 26 T. L. R. 106—Darling, J.

7. *Name under which Business Carried On—“Usual Trade Name”*—*Carrying on Business in Different Names at Two Addresses—Money-lenders Act, 1900* (63 & 64 Vict. c. 51), s. 2.—The expression “usual trade name” in sect. 2, sub-sect. 1 (a), of the Money-lenders Act, 1900, means the name by which the money-lender elects to be known; it does not mean that he must have had a “usual trade name” before the passing of the Act.

A money-lender cannot carry on business at one address under his own or usual trade name and at another address as a partner of a firm registered under a different name.

STIRLING *v.* LILBURN AND PYMAN, [1909] [W. N. 204; *sub nom.* STIRLING *v.* SILBURN AND PYMAN, 26 T. L. R. 13—Bucknill, J.

#### (c) Reopening Transaction.

8. *“Harsh and Unconscionable”*—*Excessive Interest—Money-lenders Act, 1900* (63 & 64 Vict. c. 51), s. 1.—Transaction reopened on the ground that the interest was excessive under all the circumstances of the case and having regard to the respective positions of the parties.

WOLFE *v.* BATTERS, 25 T. L. R. 575—Lord [Coleridge, J.

#### (d) Miscellaneous.

[No paragraphs in this vol. of the Digest.]

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## MONTH.

*See* LANDLORD AND TENANT; TIME.

## MONUMENTS.

*See* CHARITIES; ECCLESIASTICAL LAW; WILLS.

## MORTGAGE.

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**I. ACCOUNTS.**

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**II. ASSIGNMENTS.**

[No paragraphs in this vol. of the Digest.]

**III. CONSTRUCTION AND OPERATION.**

1. *Mortgage Kept Alive for Benefit of Owner of Equity of Redemption—Intention that Mortgage should Enure for Benefit of His Heirs—Merger—Real or Personal Property.*—H. G., the owner of the equity of redemption of certain lands, subsequently (in 1882) obtained a transfer of part of the mortgage debt and the security therefor, being part of the said lands, keeping the mortgage on foot as a subsisting charge for the benefit of his heirs and assigns, and as a protection against mesne incumbrances. H. G. afterwards (in 1905) purchased lands subject to a mortgage, which the vendors and the mortgagee conveyed and transferred to him, keeping the mortgage on foot as a subsisting charge to the hereditaments conveyed as a protection on H. G., his heirs and assigns, against subsequent incumbrances, but for no other purpose.

HELD—that the sums secured and the mortgages devolved on the personal representatives of H. G.

IN RE GIBBON, MOORE v. GIBBON, [1909] 1 Ch. [367; 78 L. J. Ch. 264; 100 L. T. 231; 53 Sol. Jo. 177—Neville, J.]

**IV. EQUITABLE MORTGAGES.****(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) By Deposit.**

[No paragraphs in this vol. of the Digest.]

**V. EQUITY OF REDEMPTION.**

[No paragraphs in this vol. of the Digest.]

**VI. FIXTURES.**

[No paragraphs in this vol. of the Digest.]

**VII. FORECLOSURE.**

See also No. 9, *infra*.

2. *Foreclosure of First Mortgagee—Consent to Order by Second Mortgagee—Right of First Mortgagee to Sue on Covenant Payment "On Demand"—Substantial Compliance with Condition*—11 Geo. 4 & 1 Will. 4, c. 47, s. 8. A second mortgagee who submits to a foreclosure order absolute in an action for first mortgage does not thereby disentitle himself to sue on his covenant for payment and to recover judgment for the mortgage debt.

A covenant by a mortgagor to pay the mortgage debt on demand is sufficiently complied with if the demand is addressed to persons who are likely to bring it home to those who are sought to be made liable under it.

WORTHINGTON & Co., LD. v. ABBOTT, [1909] [W. N. 238; 54 Sol. Jo. 83—Eve, J.]

**VIII. FRAUD.**

[No paragraphs in this vol. of the Digest.]

**IX. FURTHER ADVANCES.**

[No paragraphs in this vol. of the Digest.]

**X. GENERAL.**

3. *Charge on Property for Legacy to Another—Mortgage by Executor being also Residuary Legatee—Rights of Legatee.*—A testator, who died in 1885, by his will left all his property to his four sons by his first wife, subject to a charge for a legacy in favour of his four sons by his second wife. The legacy remained unpaid. The four elder sons in 1890 deposited the title deeds of part of the property with a bank as a security for an advance, and, in 1889, they executed a form of mortgage of the property to the bank. The bank, if they had made an investigation of title, would have obtained cognisance of the will which created the charge. The mortgagors practised no concealment.

HELD—that as the four younger sons were legatees and not merely creditors and as the bank had constructive notice of the charge, the claim of the four younger sons must prevail over the mortgage of the bank.

Graham v. Drummond ([1896] 1 Ch. 968; 65 L. J. Ch. 472; 74 L. T. 417; 44 W. R. 596; 12 T. L. R. 319—Romer, J.) distinguished.

THE BANK OF BOMBAY AND ANOTHER v. SULE-MAN SOMJI AND OTHERS, L. R. 35 Ind. App. 130; 99 L. T. 532; 24 T. L. R. 840; 52 Sol. Jo. 727—P. C.

**XI. INTEREST.**

[No paragraphs in this vol. of the Digest.]

**XII. LEASES.****(a) General.**

4. *Power of Leasing Not Exercisable by Mortgagors—Agreement Between Mortgagors and Fourth Mortgagees—Annual Sum Out of Net Profits if Sufficient by Way of Rent and Interest on Prior Mortgages—Sale by First Mortgagees—Claim by Second Mortgagees.*—F. and Sons, fourth mortgagees, had agreed with the mortgagors and F. & Co. that F. & Co. should manage the mortgaged premises and should out of the net profits after deducting a sum for management pay an annual sum by way of rent and interest on prior mortgages but without any liability for such sum if the net profits were not sufficient. The mortgagors' powers of leasing under the Conveyancing Act were by the terms of the first mortgage not exercisable without the consent of the mortgagees, and were by the terms of the second mortgage not exercisable at all.

## XII. Leases--Continued.

**HELD**—that the agreement was not binding on the first or second mortgagees; and that the first mortgagees had not entered into possession and, after exercising their power of sale, were not accountable to the second mortgagees for this annual sum, which they had not in fact received as the net profits had not been sufficient.

FLOWER AND SONS, LD. v. PRITCHARD AND [OTHERS, 53 Sol. Jo. 178—Joyce, J.]

**5. Lease by Mortgagor in Possession—Options for Lessee to Renew or Determine—Both Mortgaged and other Land in Same Lease—Relief—Leases Act, 1849 (12 & 13 Vict. c. 26)—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18.**—Where a mortgagor in possession had granted a lease for seven years of the mortgaged land under sect. 18 of the Conveyancing and Law of Property Act, 1881, such lease containing a power for the lessee to determine the lease on notice at the end of the second or fifth years, and a power for the lessee on notice to renew the lease for a further period of seven years:—

**HELD**—that the lease was not invalid because of these powers granted to the lessee.

*Seem*, that the renewal might be invalid, if it could be shown that the rent reserved on such renewal was not the best rent.

Where, however, such a lease includes other land than the mortgaged land, and at one inclusive rental, that invalidates the lease as against the mortgagee, and such lease does not become valid by the subsequent execution of a deed of apportionment between the mortgagor and the lessee.

**HELD FURTHER**—that in such a case relief could not be granted under the Leases Act, 1849.

KING v. BIRD, [1909] 1 K. B. 837; 78 L. J. K. B. [499; 100 L. T. 478—Bucknill, J.]

**6. Mortgagor in Possession—Lease by Mortgagor Prior to Mortgage—Right to Sue for Breach of Covenant by Lessee—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 10.**—By virtue of sect. 10 of the Conveyancing Act, 1881, a mortgagor in possession of property subject to a lease granted before the mortgage is entitled to maintain an action, in his own name and without making the mortgagee a party, for damages in respect of a breach of covenant to repair by the lessee of the mortgaged premises.

TURNER v. WALSH, [1909] 2 K. B. 484; 78 L. J. [K. B. 753; 100 L. T. 832; 25 T. L. R. 605—C. A.]

### (b) Goodwill.

[No paragraphs in this vol. of the Digest.]

## XIII. MARRIED WOMEN.

[No paragraphs in this vol. of the Digest.]

## XIV. PARTNERSHIP.

[No paragraphs in this vol. of the Digest.]

## XV. PAYMENTS.

See No. 2, *supra*.

## XVI. POLICIES OF LIFE ASSURANCE.

See No. 15, *infra*; BANKRUPTCY, No. 16.

## XVII. POWER OF SALE.

**7. Equitable Assignment of Part of Mortgage Debt by First Mortgagees to Fourth Mortgagees—Sale by First Mortgagees to Fourth Mortgagees.**—First mortgagees declared themselves trustees for F. and Sons of part of the mortgage debt, and then assigned that part to F. and Sons without power to the latter to give receipts for any part of the principal and interest due on the security. F. and Sons did not give notice of the assignment to any person interested in the equity of redemption. The first mortgagees then, in exercise of their statutory power, sold the premises by auction to F. and Sons for the amount of principal and interest due to themselves.

**HELD**—that the sale was valid and that the statutory power of sale was not put an end to by the assignment.

FLOWER AND SONS, LD. v. PRITCHARD AND [OTHERS, 53 Sol. Jo. 178—Joyce, J.]

## XVIII. PRACTICE.

**8. Foreclosure Order Nisi—Subsequent Application by Judgment Creditor who has Obtained Equitable Execution to be Added as Defendant—Extending Period for Redemption—Costs.**—Where a mortgagee had obtained an order for foreclosure *nisi* against a company, a judgment creditor in another action against the company obtained the appointment of a receiver by way of equitable execution. The creditor now moved to be added as a defendant in the foreclosure action and to have further time to redeem.

**HELD**—that the order in *Campbell v. Holyland* ((1877) 7 Ch. D. 166, at p. 168) was the proper order to be made in these circumstances; that it would be contrary to the practice of the court to extend the time for redemption; and that the creditor must pay the plaintiff's costs of the application.

IN RE PARBOLA, LD., BLACKBURN v. PARBOLA, [L.D., [1909] 2 Ch. 437; 78 L. J. Ch. 782; 101 L. T. 382; 53 Sol. Jo. 697—Warrington, J.]

## XIX. PRIORITIES.

### (a) General.

**9. Assignment for Benefit of Creditors—Priority of Registration—Previous Equitable Mortgages—Construction of Deed—Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14.**—C., a debtor, assigned by deed all his real and personal property to a trustee for the benefit of his creditors. C. had previously created equitable mortgages of freehold land in favour of the defendants, and had also executed a legal mortgage of the same land to a Bank. When the deed of assignment was registered under the Yorkshire Registries Act, 1884, these equitable mortgages were not so registered. Subsequently the Bank sold the mortgaged property to satisfy their claim and had a balance over. The

### XIX. Priorities—Continued.

question was, whether the trustee could claim this balance against the equitable mortgagees by priority of registration.

**HELD**—that upon the proper construction of the deed of assignment, C. conveyed to the trustee only such interest as he at the time possessed, that is, the land subject to the mortgages, that therefore the priority of the deed to the equitable mortgages was of no consequence, and that the trustee's claim must be postponed to the claims of the equitable mortgagees.

JONES v. BARKER, [1909] 1 Ch. 321; 78 L. J. [Ch. 167; 100 L. T. 188—Warrington, J.]

**10. Mortgage to Bank to Secure Current Account—Notice of Subsequent Mortgage—Further Advances—Tacking—Appropriation of Payments.**—[The rule in *Clayton's Case* (1 Mer. 572), being a presumption of fact and not a rule of law, will not be applied where it is contrary to the intention of the parties. Accordingly it will not be applied for the purpose of putting a mortgagee in a position as regards priority which the parties never intended.]

DEELEY v. LLOYD'S BANK, LD., 53 Sol. Jo. 399—  
[Eve, J.]

**11. Action—Defendant Mortgagee Successful—Contractual Right to Costs—Discretion of Court—General Costs of Action—Costs of Particular Defence—Invalid Defence.**—[A mortgagee is entitled to the general costs of an action in which he successfully asserts his priority and in which he is guilty of no misconduct, and the Court has no discretion to deprive him of such costs; but the Court may, where the security is deficient, except from such the general costs of a particular issue upon which the mortgagee has failed, even though the raising of such issue by the mortgagee was perfectly justified.]

DEELEY v. LLOYD'S BANK, LD., 53 Sol. Jo. 419  
[—Eve, J.]

#### (b) Notice.

[No paragraphs in this vol. of the Digest.]

#### (c) Possession of Title Deeds.

[No paragraphs in this vol. of the Digest.]

### XX. RECEIVER.

[No paragraphs in this vol. of the Digest.]

### XXI. REDEMPTION.

#### (a) Accounts and Costs.

[No paragraphs in this vol. of the Digest.]

#### (b) Clogging.

**12. Sale of Land—Part of Purchase Money remaining on Mortgage—Option to Vendor if Company Formed of Finding One-Third of Capital—Additional Payment Stipulated for if Option not Given—Clog—Penalty.**—[The plaintiff agreed to sell an estate to the defendants for £51,086, £5,000 of the purchase-money to be paid in cash and the balance to remain on mortgage for two years. Clause 5 of the agreement was as follows:—“The purchasers shall give the vendor the option of

finding one-third of the capital of any company . . . which they may form for the purpose of developing the said brine land. In the event of their failing to give him the said option . . . within a period of two years from the completion of the purchase they shall pay the vendor the sum of £5,000 over and above the mortgage debt of £46,086 and interest.” The purchase was completed in accordance with the agreement on September 2nd, 1907, and in July, 1908, a private company was formed for the purpose of working the estate. The whole of the capital—£100,000—was issued and no opportunity was given to the plaintiff to find one-third, but in December, 1908, he was informed by the company that it was proposed to increase its capital to £120,000 and offering him “in accordance with the terms of the said agreement” one-third of that amount, viz., 4,000 £10 shares. The plaintiff refused this offer and alleged that under the agreement he was entitled to an option to find one-third of the original capital, and not having had such option he claimed the extra £5,000 under the agreement.]

**HELD**—that the offer actually made to the plaintiff did not satisfy the option to which he was entitled; that the clause in the agreement providing for payment of the extra £5,000 formed part of the agreement to purchase and was not a clog on the equity of redemption; that the £5,000 was not intended to be a penalty but a *bona fide* alternative; and that the plaintiff was therefore entitled to recover the £5,000.

Decision of Pickford, J. (25 T. L. R. 766) affirmed.

DAVIES v. CHAMBERLAIN AND ANOTHER, 26  
[T. L. R. 138—C. A.]

#### (c) Consolidation.

See also BANKRUPTCY, No. 16.

**13. Mortgage in Name of Trustee—Different Mortgages of Different Properties by Different Mortgagors—Equities of Redemption Assigned to Same Person.**—[The doctrine of consolidation does not apply where mortgages of two different properties have been made by different mortgagors, even though the equitable title to both such properties was vested in one only of the mortgagors, and even though such mortgagor subsequently takes an assignment of the equity of redemption in the property not originally mortgaged by him.]

SHARP v. RICKARDS, [1909] 1 Ch. 109; 78  
[L. J. Ch. 29; 99 L. T. 916—Neville, J.]

### XXII. RESTRICTIVE COVENANTS.

[No paragraphs in this vol. of the Digest.]

### XXIII. SALE.

[No paragraphs in this vol. of the Digest.]

### XXIV. SETTLED LANDS.

**14. Infant Tenant in Tail in Remainder—Maintenance—Order of Court—Disentailing Deed by way of Mortgage—Jurisdiction.**—[The Court has



**XXIV. Settled Lands—Continued.**

no power to direct a disentailing deed by way of mortgage of the estate of an infant tenant in tail.

*In re Hamilton* ((1885) 31 Ch. D. 291; 55 L. J. Ch. 282; 53 L. T. 840; 34 W. R. 203—C. A.) and *Cadman v. Cadman* ((1886) 33 Ch. D. 397; 55 L. J. Ch. 833; 55 L. T. 569; 35 W. R. 1—C. A.) followed.

**IN RE HAMBROUGH'S ESTATE, HAMBROUGH v. [HAMBROUGH, [1909] 2 Ch. 620; 101 L. T. 521; 53 Sol. Jo. 770—Warrington, J.**

**XXV. SOLICITOR MORTGAGEE.**

[No paragraphs in this vol. of the Digest.]

**XXVI. SURETY.**

*See* GUARANTEE, No. 2.

**XXVII. TRANSFER.**

[No paragraphs in this vol. of the Digest.]

**XXVIII. TRUSTEES.**

**15. Policy of Insurance—Raising Money to Pay Off a Charge for Premiums already Incurred—Preservation of Trust Estate—Mortgage—Jurisdiction.**—M. assigned, *inter alia*, certain policies of insurance to his wife in trust for herself and infant children, and at the time of the assignment the said policies were subject to a lien in respect of premiums and interest on said premiums which had been paid on the policies.

**HELD**—that the Court had power to sanction the raising by the wife as trustee of money by mortgage for the purpose of repaying the money due to the bank (who had the lien) in respect of money already advanced by them for the payment of past premiums on the policies of insurance, inasmuch as the same was necessary for the preservation of the trust estate and was for the benefit of the *cestuis que trustent*.

**MOORE v. ULSTER BANK, 43 I. L. T. 136—**  
[Meredith, M.R., Ireland.]

**MORTMAIN ACTS.**

*See* CHARITIES; REAL PROPERTY.

**MOTOR CARS.**

*See* STREET TRAFFIC, II.

*See also* METROPOLIS, No. 13; NEGLIGENCE, Nos. 11, 12, 13, 14.

**MUNICIPAL CORPORATIONS.**

*See* LOCAL GOVERNMENT.

**MUSIC HALLS.**

*See* THEATRES, MUSIC HALLS AND SHOWS.

**MUSICAL COPYRIGHT.**

*See* COPYRIGHT AND LITERARY PROPERTY.

**NAME.**

*See* WILLS.

**NATAL.**

*See* DEPENDENCIES AND COLONIES.

**NATURALISATION AND DENIZATION.**

*See* ALIENS.

**NAVIGABLE WATERS.**

*See* WATERS AND WATERCOURSES.

**NAVIGATION.**

*See* SHIPPING AND NAVIGATION.

**NAVY.**

*See* ROYAL FORCES.

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See also ANIMALS, No. 12; EDUCATION, Nos. 3, 4; MASTER AND SERVANT, No. 27; PLEADING, Nos. 4, 5; SHIPPING, Nos. 24, 50; TRAMWAYS, No. 5; WATERS, No. 1.

**I. CONTRACTORS AND SUB-CONTRACTORS.**

[No paragraphs in this vol. of the Digest.]

**I. CONTRIBUTORY NEGLIGENCE.**

See also ANIMALS, Nos. 10, 12; PLEADING, No. 4.

1. *Dangerous Article—Duty to take Precautions—Gas Explosion.*—In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that an accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. On the other hand, if the proximate cause of the accident is not the negligence of the defendant but the conscious act of volition of another, the defendant is not liable, for against such conscious act of volition no precaution can really avail.

**DOMINION NATURAL GAS CO., LD. v. COLLINS;**  
[**SAME v. PERKINS AND OTHERS,** [1909] A. C. 640; 101 L. T. 359; 25 T. L. R. 831—P. C.]

2. *Child of Four and a Half Years Run Over by Tramway Car—Failure of Child to Look Out Before Crossing Street.*—A child of four and a half years of age was knocked down and run over by a tramway car and sustained serious injury. In an action against the tramway company it was proved that the child suddenly left the foot-pavement and hurried across the street in front of the car, and that while he was doing so, instead of looking to see whether the street was clear, he was examining a bag of nuts which he had just bought and was carrying.

**HELD**—that the child was guilty of contributory negligence.

**CASS v. EDINBURGH AND DISTRICT TRAMWAYS**  
[Co., LD., [1909] S. C. 1068; 46 Sc. L. R. 734—Ct. of Sess.]

**III. DANGEROUS EMPLOYMENT.**

See No. 1, *supra*.

**IV. DEFECTIVE PLANT, etc.**

[No paragraphs in this vol. of the Digest.]

**V. LOCAL AUTHORITIES.**

3. *Highway Repair—Whole Width of Surface of Road Metalled at Once—Death of Horse from Over-Exertion in Pulling Load over Road—Negligence of Local Authority—Consequence of Negligence.*—In an action brought to recover damages for the death of his horse, which had died from over-exertion in pulling a wagon over loose stones laid by the defendants on a highway in the course of repairing it, the plaintiff alleged negligence on the defendants' part, especially in that an excessive thickness of stone was laid over the whole of the surface of the road at one time. The jury found for the plaintiff.

**HELD**—that although it was negligence on the part of the local authority to cover the whole width of the roadway with stone to the depth of some five inches before any part had been rolled in, nevertheless the servant of the plaintiff had elected to run the risk to his horse arising from taking it with the load he had across the loose metal, and there being no evidence that the accident was the direct and natural consequence of the defendants' negligence, they were entitled to judgment.

Judgment of Lord Alverstone, C.J., in Div. Ct. (99 L. T. 847; 72 J. P. 526; 7 L. G. R. 60) approved.

**TORRANCE v. ILFORD URBAN DISTRICT**  
[**COUNCIL,** 73 J. P. 225; 25 T. L. R. 355; 53 Sol. Jo. 301; 7 L. G. R. 554—C. A.]

**VI. LICENSEES AND VISITORS.**

4. *Dangerous Premises—Unlighted Staircase in Flat—Obligation of Landlord to Light Staircase—Injury to Person Delivering Goods to Tenant—Liability of Landlord.*—By a contract between the owner of a block of flats and his tenants, the former agreed to light the staircases on the premises when it was necessary. The plaintiff, who was delivering goods to one of the tenants of the flats, having been injured in going down one of the staircases which was not lighted, sued the owner of the flats to recover damages.

**HELD**—that there was no invitation to the plaintiff by the defendant to use the staircase, which the plaintiff could see was quite dark, and, therefore, that the defendant was not liable.

**LEWIS v. RONALD,** 101 L. T. 534; 26 T. L. R. [30; 54 Sol. Jo. 32—Div. Ct.]

**VII. LORD CAMPBELL'S ACT.**

[No paragraphs in this vol. of the Digest.]

**VIII. ONUS OF PROOF.**

[No paragraphs in this vol. of the Digest.]

**IX. PROXIMATE CAUSE.**

5. *Banker—Forged Cheque—Forgery of Customer's Signature—Customer's Negligence—Estoppel.*—A Bank is liable to refund moneys paid upon forged cheques unless it can be shown that the moneys were paid in consequence of the customer's negligence immediately connected

### IX. Proximate Cause—(Continued).

with the transaction, which negligence was the proximate cause of the loss.

**KEPITIGALLA RUBBER ESTATES, LD. v. [NATIONAL BANK OF INDIA, LD., [1909] 2 K. B. 1010; 78 L. J. K. B. 964; 100 L. T. 516; 25 T. L. R. 402; 53 Sol. Jo. 377; 14 Com. Cas. 116; 16 Manson, 234—Bray, J.]**

### X. RAILWAY MANAGEMENT.

**6. "Invitation to Alight"—Train Overshooting Platform—Passenger Alighting before Warning could be Given—Evidence of Negligence.**—The plaintiff, a season ticket holder, was travelling by train from B. to P. on a dark and foggy night. At P. the train overshot the platform by about 130 yards and then drew up. The engine-driver sounded his whistle and sent the fireman back to see that none of the passengers alighted, but before the fireman had time to give this warning the plaintiff alighted and in doing so was injured. In an action for damages for injuries sustained on account of the alleged negligence of the defendant railway company:—

**HELD**—that there was no evidence of negligence to go to the jury.

**ANTHONY v. MIDLAND RY. CO., 100 L. T. 117; [25 T. L. R. 98—Div. Ct.]**

**7. Injuries Caused by Alleged Servant of Railway Company—Actual Employment—Findings of Jury.**—In this action against a "tube" railway company to recover damages for personal injuries sustained by the plaintiffs, caused by the fall of T., alleged to be in the defendants' employment, from the top of a lift shaft and through the roof of the ascending lift, the following questions were left to the jury:—(1) Was T. at the time of the accident in the actual employment of the defendants and was he guilty of negligence in opening the doors of the lift? (2) Did T. commit suicide, and, if so, had the defendants provided proper appliances for working the doors of the lift? (3) What were the damages? The jury found that T. was in the actual employment of the defendants at the time of the accident; that there was no evidence that T. was guilty of negligence; that T. did not commit suicide; and that the defendants had not supplied reasonably safe appliances for the doors of the lift. The jury assessed the damages at £950.

**HELD** by Lawrence, J.—that the answer as to the actual employment of T., besides being against the weight of evidence, was made unnecessary by the answer that there was no evidence of negligence on the part of T.; that the negative answer as to suicide disposed of the whole of the second question; and that judgment must be entered for the defendants.

On appeal, decision of Lawrence, J., reversed and judgment entered for plaintiffs.

**MACAULEY v. GREAT NORTHERN, PICCADILLY [AND BROMPTON RY. CO., Times, April 30th, 1909—C. A.]**

### XI. TRESPASSERS.

**8. Defective Fence—Infant Trespasser—Railway Company—Turntable—Dangerous**

**Machine.**—A railway company maintained a siding and a turntable on a piece of ground adjacent to a public road which crossed their line by a bridge. This piece of ground was approached from the road by a gate, which was kept locked, and was separated from the road leading to the bridge by a hedge in which there was a gap large enough for a child to get through, and there was a track, more or less defined, leading from the gap to the turntable. Some young boys obtained access to the turntable by coming through the gap, as was alleged, and set the turntable in motion, whereby one of them received serious injuries, for which he claimed damages. There was evidence that on at least one previous occasion a man in the employment of the company had seen boys playing on the turntable, and that they ran away at his approach.

**HELD**—that though the defective condition of the hedge was not the effective cause of the accident, yet that there was evidence of negligence on the part of the company to go to a jury.

Decision of the Court of Appeal in Ireland ([1908] 2 I. R. 242) reversed.

Judgment of the King's Bench Division restored.

**COOKE v. MIDLAND GREAT WESTERN RY. [OF IRELAND, [1909] A. C. 229; [1909] 2 I. R. 499; 78 L. J. P. C. 76; 100 L. T. 626; 25 T. L. R. 375—H. L.]**

**9. Unfenced Quarry in Private Ground—Accident to Child—Trespass.**—A father brought an action against the owners of a piece of ground for damages for the death of his son, aged six years, who was drowned through falling into a disused quarry situated therein. To reach the quarry the child had trespassed, first, through a broken fence on to a waste piece of land (on which children were in the habit of playing), which belonged to another proprietor, and thence through a hole in another fence on to the defenders' property.

**HELD**—that the defenders were not liable, in respect that they were not bound to fence the quarry.

**HOLLAND v. DISTRICT COMMITTEE OF THE [MIDDLE WARD OF LANARKSHIRE, [1909] S. C. 1142; 46 Sc. L. R. 758—Ct. of Sess.]**

**10. Isolation Hospital—Separated from Adjoining Land by Wire Fence—Child Crawling under Fence—Child Catching Disease—Evidence of Negligence.**—An isolation hospital had been erected, owing to an outbreak of diphtheria, on land adjoining the house in which plaintiff lived with his family. One of the plaintiff's children, aged seven, caught diphtheria. Four days previously she had crawled under the wire fence separating the hospital from the plaintiff's land and had approached the hospital where the infected children and nurses were. She had also played with a kitten which had lived at the hospital.

**HELD**—that there was no evidence of negligence on the part of the defendants to go to the



### XI. Trespassers—Continued.

jury, as the child might have caught the disease in many different ways.

SHERWELL *v.* ALTON URBAN DISTRICT  
[COUNCIL, 25 T. L. R. 417—Ridley, J.]

### XII. VEHICLES—OWNERS AND DRIVERS.

11. *Motor-Omnibus Overhanging Footpath—Damage to Lamp-post on Footpath—Prima facie Evidence of Negligence—Burden of Proof.*—If a motor-omnibus, duly licensed and constructed according to the requirements of the police, whilst travelling upon a roadway during daylight does damage to a fixed structure upon a footway, such as a lamp-post, by a part of the omnibus overhanging the footway, the fact of the collision is *prima facie* evidence of negligence on the part of the driver of the motor-omnibus. To displace such evidence it must be shown that the driver was at the time using reasonable care in driving the omnibus, and that the collision occurred notwithstanding such care.

BARNES URBAN DISTRICT COUNCIL *v.* LONDON  
[GENERAL OMNIBUS CO., 100 L. T. 115; 73  
J. P. 68; 7 L. G. R. 359—Div. Ct.]

12. *Damage to Standard Lamp on Footpath by Motor-Omnibus—Skidding of Omnibus.*—A standard lamp erected on the footpath in front of the plaintiff's premises was damaged by a motor-omnibus of the defendants colliding with it. The centre of the standard was 14½ inches from the edge of the kerb, and it was struck at a height of 8 feet from the ground, the standard being broken at a height of 5 feet 6 inches from the ground. The deputy county court judge nonsuited the plaintiffs upon the grounds (1) that there was no evidence of negligence on the part of the defendants, and (2) even if there was such negligence the plaintiffs were not entitled to recover, as they had not shown any right to erect the standard on the footpath.

HELD—that the defendants were not entitled to raise the second point, and that the fact that a vehicle which in ordinary circumstances confined itself to the roadway had knocked down a permanent structure on the pavement was evidence upon which the jury might come to the conclusion that there was negligence on the part of the driver of the vehicle; and that the case must go back for a new trial.

ISAAC WALTON & CO. *v.* VANGUARD MOTOR-  
[BUS CO., 72 J. P. 505; 25 T. L. R. 13; 53  
Sol. Jo. 82; 7 L. G. R. 349—Div. Ct.]

13. *Personal Injury by Skidding of Motor-omnibus—Nuisance.*—The plaintiff stepped out into the road in front of a motor-omnibus belonging to the defendants, whereupon the driver, to avoid running over the plaintiff, steered to his off-side, released the clutch, applied the brakes, and locked the back wheels, with the result that the omnibus skidded and in doing so struck the plaintiff and injured him. At the trial of an action brought by the plaintiff against the defendants to recover damages, the

judge left to the jury the question as to whether the driver was negligent, and the further question as to whether the defendants had placed a nuisance on the highway, the omnibus having skidded and being liable to skid and cause injury without any negligence on the part of the driver. The jury found that there had been no negligence on the part of the driver, and disagreed upon the question of nuisance.

HELD—that upon these findings judgment should be entered for the defendants, and that the question of nuisance should not have been left to the jury at all.

Decision of Div. Ct. (100 L. T. 409; 73 J. P. 283; 25 T. L. R. 429) affirmed.

PARKER *v.* LONDON GENERAL OMNIBUS CO.,  
[LD., 101 L. T. 623; 26 T. L. R. 18; 53 Sol. Jo.  
867; 7 L. G. R. 1111—C. A.]

14. *Motor-Omnibus—Sent Out on Greasy Road—Personal Injury by Skidding of Motor-Omnibus—Nuisance.*—Where an accident happens to a passenger owing to a motor-omnibus skidding the mere fact that the proprietor of the motor-omnibus places it on the road to ply for passengers knowing that all such vehicles have a tendency to skid when the road is in a greasy or slippery condition is not evidence of negligence or of nuisance.

Decision of Div. Ct. (100 L. T. 301; 73 J. P. 170; 53 Sol. Jo. 287) reversed (Buckle, J., dissenting).

WING *v.* LONDON GENERAL OMNIBUS CO., LD.,  
[1909] 2 K. B. 652; 78 L. J. K. B. 1063; 101  
L. T. 411; 73 J. P. 429; 25 T. L. R. 729; 53  
Sol. Jo. 713; 7 L. G. R. 1093—C. A.]

15. *Fire Engine—Duty of Driver.*—There is no Act of Parliament and no law which relieves the drivers of fire engines of the duty to take every possible step to avoid running over passengers in the road, even though such passengers have failed to take notice of the warning bell or have become flurried.

SCUDDER *v.* LONDON COUNTY COUNCIL, *Times*,  
[July 15th, 1909—C. A.]

### XIII. MISCELLANEOUS.

16. *Hospital—Patient—Personal Injury—Surgical Operation—Negligence of Professional Staff—Liability of Hospital Authority.*—A hospital authority is not liable in damages to a non-paying patient for the negligence of its professional staff in matters of professional skill, provided that it has used reasonable care in selecting a competent staff and has furnished the staff with proper apparatus and appliances.

Decision of Div. Ct. (25 T. L. R. 468) affirmed.

HILLYER *v.* GOVERNORS OF ST. BARTHOLO-  
MEW'S HOSPITAL, 1909 2 K. B. 820; 78  
L. J. K. B. 958; 101 L. T. 368; 25 T. L. R.  
762; 53 Sol. Jo. 714; *sub nom.* HILLYER *v.*  
LONDON CORPORATION, 73 J. P. 501—C. A.]

## NEGOTIABLE INSTRUMENTS.

*See* **BILLS OF EXCHANGE, ETC.**

## NEWFOUNDLAND.

*See* **DEPENDENCIES AND COLONIES.**

## NEW SOUTH WALES.

*See* **DEPENDENCIES AND COLONIES.**

## NEWSPAPERS.

*See* **CRIMINAL LAW ; LIBEL ; PRESS AND PRINTING.**

## NEW ZEALAND.

*See* **DEPENDENCIES AND COLONIES.**

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*See* **DESCENT AND DISTRIBUTION.**

## NON COMPOS PERSON.

*See* **LUNATICS.**

## NOTARIES.

*See also* **EVIDENCE, No. 9.**

1. *Appointment in Colony—Convenience of Public—Consideration as to Number of Notaries.*—Great weight is to be attached to the views of notarial societies, but in spite of opposition by the Society of Notaries for the State of Victoria a faculty was issued on unusually influential evidence as to the insufficiency of notaries for the appointment of the applicant as a notary for Melbourne. In the future any application for appointment as a notary for Melbourne will not be encouraged (unless such application is very strongly supported) if the effect of granting it would be to add to the number of notaries in Melbourne.

**FAY v. THE SOCIETY OF NOTARIES FOR THE [STATE OF VICTORIA, [1909] P. 15 ; 25 T. L. R. 92—Sir L. Dibdin.**

## NOTICE OF DISHONOUR.

*See* **BILLS OF EXCHANGE.**

## NOTICE TO QUIT.

*See* **LANDLORD AND TENANT.**

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*See* **CONTRACT.**

## NUISANCE.

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*See also* **HIGHWAYS, No. 19 ; METROPOLIS, No. 8 ; NEGLIGENCE, Nos. 13, 14.**

### I. WHAT AMOUNTS TO.

#### 1. *Noise—Children in Nursing Charity.*

**HELD**, on the evidence—that the use of a house as a day-nursing charity did not by the crying of the children therein amount to an actionable nuisance.

*Semble*, an action might lie if in such an institution the children were neglected by the nurse and allowed to cry as much as they liked.

**MOY v. STOOP, 25 T. L. R. 262—Channell, J.**

2. *Sewage—Oyster Layings—Discharge of Untreated Sewage into Tidal Waters—Nuisance—Common Law or Prescriptive Right to Discharge Sewage.*—Untreated sewage was discharged by a corporation into tidal waters so as to pollute the plaintiff's oyster-beds.

**HELD**—that the corporation had neither a common law right nor a prescriptive right to discharge sewage into the sea so as to cause a nuisance, and that an injunction with an inquiry as to damages must be granted.

**Hobart v. Southend-on-Sea Corporation** ((1906) 75 L. J. K. B. 305 ; 70 J. P. 192 ; 54 W. R. 454 ; 94 L. T. 337 ; 22 T. L. R. 307, 530 ; 4 L. G. R. 757—Buckley, J.) and **Foster v. Warblington Urban District Council** ([1906] 1 K. B. 648 ; 75 L. J. K. B. 574 ; 70 J. P. 233 ; 54 W. R. 575 ;

**I. What Amounts to** *Continued.*

94 L. T. 876; 22 T. L. R. 421; 1 L. G. R. 735—C. A.) followed.

**HELD FURTHER**—that scientific treatment would lessen the risk of contamination, and that the effluent might be discharged so as not to pass over the beds; but that if it could be neither sufficiently purified nor so discharged as to obviate damage to the beds, the corporation must discharge its sewage elsewhere.

**OWEN v. FAVERSHAM CORPORATION**, 72 J. P. [404—Eve, J.]

On appeal, **HELD** that *Foster v. Warblington Urban District Council* (*supra*) was binding on the Court. Decision of Eve, J., affirmed, 73 J. P. 33—C. A.

**3. Motor-Omnibus Skidding—Skidding due to Sudden Emergency.**—The skidding of a motor-omnibus upon a greasy road, where there is no negligence on the part of the driver and the skidding is due to the precautions taken by the driver to bring the vehicle to a sudden stop in order to avoid an accident, is no evidence that the particular vehicle is a nuisance for the placing of which on the highway the owners are liable if damage ensues.

Decision of Div. Ct. (100 L. T. 409; 73 J. P. 283; 25 T. L. R. 429) affirmed.

**PARKER v. LONDON GENERAL OMNIBUS CO.** [101 L. T. 623; 26 T. L. R. 18; 53 Sol Jo. 867; 7 L. G. R. 1111—C. A.]

See S. C. under NEGLIGENCE, No. 13.

**4. Omnibus — Motor-Omnibus — Damage to Lamp-post — Skidding — No Evidence of Negligence.**—In an action to recover damages for an injury done to a standard lamp erected on the pavement by a motor-omnibus skidding into it on a day when the roads were greasy, the county court judge found that the omnibus in question was duly licensed, that the driver was guilty of no personal negligence, that it was a well-known fact that in certain conditions motor-omnibuses were liable to skid, and that when they did so it was impossible to control them; and he held that in these circumstances the defendants were liable for placing a nuisance on, and for negligently using, the highway; he accordingly gave judgment for the plaintiff.

**HELD** (dismissing the appeal)—that in view of the findings of fact of the county court judge, the Court could not interfere.

**GIBBONS v. VANGUARD MOTOR BUS CO.**, 72 [J. P. 505; 25 T. L. R. 13; 53 Sol. Jo. 82; 7 L. G. R. 349—Div. Ct.]

**5. Motor-Omnibus — Skidding — Sent Out on Greasy Road.**—Where an accident happens to a passenger owing to a motor-omnibus skidding, the mere fact that the proprietor of the motor-omnibus places it on the road to ply for passengers knowing that all such vehicles have a tendency to skid when the road is in a greasy or slippery condition, is not evidence of negligence or of nuisance.

Decision of Div. Ct. (100 L. T. 301; 73 J. P. 170; 53 Sol. Jo. 287) reversed (Buckley, L.J., dissenting).

**WING v. LONDON GENERAL OMNIBUS CO., LD.** [1909] 2 K. B. 752; 78 L. J. K. B. 1063; 101 L. T. 411; 73 J. P. 429; 25 T. L. R. 729; 53 Sol. Jo. 713; 7 L. G. R. 1093—C. A.]

**6. "Offensive" Trade Advertisement Hoarding — Breach of Covenant not to Erect Building for the Purposes of Offensive Trade.**—Where land was sold as a building estate, subject to restrictive covenants, one of which was a covenant not to erect any building for the purpose of carrying on any noisome, offensive, or dangerous trade or calling:

**HELD** (Fletcher Moulton, L.J., dissenting)—that the erection of an advertisement hoarding was a breach of the covenant.

**NUSSEY v. PROVINCIAL BILL POSTING CO.** [AND EDDISON, [1909] 1 Ch. 734; 78 L. J. Ch. 539; 100 L. T. 687; 25 T. L. R. 489; 53 Sol. Jo. 418—C. A.]

**II. REMEDIES.****(a) Indictment.**

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**(b) When Action Lies.**

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**(c) Damages.**

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**(d) Injunction.**

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See HUSBAND AND WIFE.

**OATHS AND AFFIRMATIONS.**

See CRIMINAL LAW; EVIDENCE; PRACTICE AND PROCEDURE.

**OBSCENE BOOKS.**

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**OBSTRUCTING JUSTICE.**

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See CRIMINAL LAW AND PROCEDURE.



**OMNIBUSES.**

*See* NEGLIGENCE; STREET TRAFFIC.

**ONTARIO.**

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**OPEN SPACES AND RE-CREATION GROUNDS.**

*See* COMMONS; STREET TRAFFIC, No. 12.

**OVERSEERS.**

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**PARENT AND CHILD.**

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**PARISH COUNCILS.**

*See* LOCAL GOVERNMENT.

**PARKS.**

*See* OPEN SPACES.

**PARLIAMENT.**

*See also* CRIMINAL LAW, No. 40.

*Parliamentary Paper—Libel—Liability of Person Publishing Extract from Blue-book—Fair Comment—Privilege—Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), s. 3.*—Any person who *bonâ fide* and without malice publishes an extract from or an abstract of a

Parliamentary paper is protected by sect. 3 of the Parliamentary Papers Act, 1840, against an action of libel brought in respect of a statement contained in such extract or abstract.

MANGENA *v.* WRIGHT, [1909] 2 K. B. 958; 78 [L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485—Phillimore, J.

**PARTICULARS.**

*See* AUCTIONS; COUNTY COURTS; PLEADING; PRACTICE AND PROCEDURE; SALE OF LAND.

**PARTITION.**

1. *Partition Action—Practice—Certificate—Description of Estate of Married Woman.*—In a partition action where a married woman is found by certificate to be entitled to any real property, the certificate should state, where she is entitled independently of the Married Women's Property Act, 1882, that she is entitled "for her separate use"; and, where she is entitled under that Act, that she is entitled to the property "as her separate property."

BROAD *v.* ASKHAM, [1909] W. N. 236—Joyce, J.

2. *Partition Action—Practice—Certificate—Married Woman Entitled Not for Separate Use.*—In a partition action where a woman, E. C. W., married to E. E. W. in 1877, was beneficially entitled in fee simple to property but not for her separate use, the certificate should read, "The defendants E. E. W. and E. C. W. in fee simple in right of the said E. C. W."

BARRETT *c.* WATTS, [1909] W. N. 237—Joyce, J.

3. *Partition Action—Costs—Special Costs in Respect of Particular Share.*—In a partition action special costs incurred in respect of one particular share should be borne wholly by that particular share.

IN RE MAHONEY'S ESTATE, [1909] 1 I. R. 132 [—Ross, J., Ireland.

**PARTNERSHIP.**

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**I. CONSTITUTION OF PARTNERSHIP.**

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**II. RIGHTS AND LIABILITIES OF PARTNERS.****(a) Accounts.**

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**(d) Retiring Partner.**

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**(e) Surviving Partner.**

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**(f) In General.**

**1. Option to Purchase Share of Deceased Partner—New Partnership—Assets Taken Over—Interest Paid on Deceased Partner's Capital—Assignment for Creditors—Unpaid Creditors of Former Partnership—Novation—Right of Proof of Deceased Partner's Executors.**—Where an option to purchase the share of a deceased partner has been exercised by the surviving partner, and a firm with a new partner has been constituted which has assumed liability for the debt due to the executors of the deceased, and the new firm then executes an assignment for the benefit of its creditors, although there are some creditors of the former firm whose debts are unpaid, the rule in *Ex parte Sillitoe* (1 Gl. & J. 374) will not prevent the executors proving against the assigned estate in competition with creditors of the new partnership, there being no initial nor continuing joint liability of the executors and the members of the new firm to creditors of the old firm ; nor, *semble*, any novation of the debts of the old firm's creditors.

IN RE JOSEPH AND BERGEL'S DEED OF ASSIGNMENT. *PEARS v. BERGEL*. 100 J. T. 74—Eve, J.

Y.D.

**III. CONTRACTS WITH PARTNERS.**

[No paragraphs in this vol. of the Digest.]

**IV. DISSOLUTION.**

**2. Duration of Partnership Undefined—Dissolution to be by Mutual Consent—Notice of Dissolution—Validity—Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 26, 32.**—Although no fixed time is provided for the continuance of a partnership within the meaning of sect. 26 of the Partnership Act, 1890, yet, as the partnership is therefore to continue for an undefined time within the meaning of sect. 32, if there be an agreement between the partners as to dissolution by mutual consent only, a mere notice dissolving the partnership, without consent, is not a good notice.

MOSS v. ELPHICK, 128 L. T. Jo. 173—Div. Ct.

**V. GOODWILL.**

[No paragraphs in this vol. of the Digest.]

**PARTY WALLS.**

See BOUNDARIES ; EASEMENTS ; METROPOLIS.

**PATENTS AND INVENTIONS.**

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**I. SPECIFICATION.**

(1) **Amendment and Disclaimer.**

[No paragraphs in this vol. of the Digest.]

(2) **Construction.**

[No paragraphs in this vol. of the Digest.]

(3) **Disconformity.**

[No paragraphs in this vol. of the Digest.]

**II. GRANT: APPLICATION, OPPOSITION, AND REVOCATION.**

1. *Petition for Revocation—Patentee not Inventor of Part of Patented Invention—Patent obtained in Fraud of Rights of Inventor—Revocation of Whole Patent—Revocation not Postponed for Amendment of Specification—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), ss. 15, 25.*—If in proceedings for revocation of a patent it appears that the patentee is not the inventor of a material part of the invention for which the patent is granted, it is the duty of the Court to revoke the patent, and it has no power to exclude from the patent that part of which the patentee was not the inventor.

And if the patentee has obtained the patent in fraud of the rights of the petitioner in such proceedings as regards the material part of which the patentee was not the inventor, the Court will make an absolute order for revocation, and will not limit it to take effect only in case the patentee does not within a reasonable time obtain leave to amend the specification by disclaiming the parts of which he is not the inventor.

*Deeley v. Perks* ([1896] A. C. 496; 75 L. T. 233; 67 L. J. Ch. 912; 13 R. P. C. 581—H. L.) distinguished.

The expression in sect. 26 of the Patents, Designs, and Trade Marks Act, 1883, and in sect. 25 of the Patents and Designs Act, 1907, "in fraud of the rights of the true and first inventor" involves the idea of moral turpitude on the part of the patentee, and the existence of this element may be inferred not merely from his conduct prior to and at the time of the application or grant, but also from the use which he makes of the grant when obtained, as, for example, by insisting, as against the true inventor, on treating the invention as his own.

*Dictum of Cotton, L.J., in In re Avery's Patent* (36 Ch. D. 324; 57 L. T. 509—C. A.) followed.

A material part of the patented invention being taken in fraud of the rights of the petitioner, a declaration that the petitioner was the true and first inventor of that part was made in addition to the order for revocation.

**IN RE RALSTON'S PATENT; IN RE PRESTON**  
[AND RALSTON'S PATENT, 100 L. T. 386;  
26 R. P. C. 313—Warrington, J.]

2. *Petition for Revocation—Inadequate Working in United Kingdom—Appeal from Decision of Comptroller—Evidence on Appeal—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 27.*—Sect. 27 of the Patents and Designs Act, 1907, was not meant to penalise want of success when the patentee has done his best to comply with the requirements of the Act.

The Court reversed the decisions of the Comptroller-General of Patents revoking two patents on the ground of inadequate working in the United Kingdom, being satisfied that as to one of the patents the owners had used, and were still using, their best endeavours to establish in this country an industry in the patented article, and that their want of success had been due to circumstances beyond their control and not to the manner in which they had exercised the rights conferred upon them by the patent; and that as to the other patent satisfactory reasons had been given for the small extent to which it had been worked in this country. The Court, on the hearing of the appeals, admitted evidence which was not before the Comptroller, but intimated that this was not to be taken as a precedent governing other cases.

**IN RE BREMER'S PATENT, EX PARTE BRAULIK;**  
[IN RE HÜGNER'S PATENT, EX PARTE  
BRAULIK, [1909] 2 Ch. 217; 78 L. J. Ch.  
550; 101 L. T. 21; 25 T. L. R. 610; 26 R. P. C.  
449—Parker, J.]

**III. SUBJECT-MATTER.**

(1) **Invention.**

*See* No. 1, *supra*.

(2) **Combination.**

3. *Combination of Known Elements—Validity—Claim—Old and New.*—Though the elements of a patent are all old the patent is not invalid



### III. Subject-Matter—Continued.

on the ground of anticipation, where the combination of the elements is novel and meritorious. Where a patentee's claim is not for a new part in an old combination, but for a new combination of old parts, "substantially as set forth," it is not necessary to state in the claim what is old and what is new, provided the patentee shows by his claim what is the new combination, the combination itself being both the merit and the novelty.

*Forwell v. Bostock* ((1861) 4 De G. J. & S. 298) distinguished and considered.

LYNCH AND OTHERS *v.* PHILLIPS & Co., [1909]  
[S. C. 884; 46 Sc. L. R. 606—Ct. of Sess.]

### IV. ANTICIPATION: PRIOR USE OR PRIOR PUBLICATION.

[No paragraphs in this vol. of the Digest.]

### V. FIRST AND TRUE INVENTOR.

*See* No. 1, *supra*.

### VI. UTILITY.

[No paragraphs in this vol. of the Digest.]

### VII. ASSIGNMENT OR SALE, AND CONSTRUCTION OF AGREEMENTS THEREFOR.

[No paragraphs in this vol. of the Digest.]

### VIII. LICENCE.

4. *Limited Licence—Effect on Purchasers—Purchaser Attacking Validity of Patent—Estoppel—Right of Owners in Equity and Patentee to Maintain Action for Infringement.*—The owners in equity of a patent together with the patentee may maintain an action for infringement of the letters patent.

The owners in equity and the patentee of a patented article granted to purchasers of articles made in pursuance of the invention, or any person into whose hands the same might come, a limited licence to use or sell the same on the express condition that they were not to be sold or advertised for sale at less than a specified price, and on every cardboard box in which the articles were made up the provisions of the licence were stated, with a warning that any sale in breach of the provisions would be an infringement of the patent.

HELD—that a purchaser of the patented article was not bound to accept the position of licensee, and was not estopped from attacking the validity of the patent.

GILLETTE SAFETY RAZOR CO. *v.* A. W. GAMAGE,  
Ld., 25 T. L. R. 808; 26 R. P. C. 745—  
Parker, J.

### IX. PROLONGATION.

5. *Principles on which Court Acts—Patents and Designs Act, 1907* (7 Edw. 7, c. 29), s. 18.]—By sect. 18 of the Patents and Designs Act, 1907, the Court, in considering whether or not the term of a patent should be extended, "shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case." The Court must,

therefore, consider the nature and importance of the disclosure made in the specification to the public, and for that purpose questions of novelty and subject-matter are necessarily material; and it is the duty of the petitioner for an extension of term to bring to the notice of the Court all that may in any way affect the judgment of the Court in those matters. But if, after hearing the evidence of the petitioner's witnesses, there is in the opinion of the Court a *prima facie* case for upholding the validity of the patent in respect of novelty and subject-matter, the Court need not, as a general rule, investigate the matter further, it being always open to an objector to challenge the validity of the patent in proceedings more appropriate for that purpose.

For the purpose of considering whether a patentee has been adequately remunerated, profits on his corresponding foreign patents as well as on his English patents must be taken into account, and some allowance ought also to be made for profits which will, in all probability, be received in respect of both before their expiration. It is incumbent on a patentee, who petitions for an extension of his patent, to prove that he has done all that a patentee could do to launch his invention on the British market. He ought also to state all facts which are within his knowledge, and which it is obviously material that the Court should know.

When the Comptroller opposes the extension of a patent on the ground that the traders of this country will, if the patent is prolonged, be put at a disadvantage compared with the traders of some other country, proper statistics or other information ought to be supplied to the Court as to the nature and extent of the competition which is feared.

IN RE JOHNSON'S PATENT (No. 2), [1909] 1 Ch., [114; 77 L. J. Ch. 737; 99 L. T. 697; 24 T. L. R. 889; 25 R. P. C. 709—Parker, J.]

6. *Power to Grant Second Extension—Patents and Designs Act, 1907* (7 Edw. 7, c. 29), s. 18.]—The Court has no power under sect. 18 of the Patents and Designs Act, 1907, to grant a second extension of the term of a patent.

IN RE THOMPSON'S PATENT, [1909] 2 Ch. 447; [78 L. J. Ch. 690; 101 L. T. 261; 25 T. L. R. 824; 26 R. P. C. 673—Parker, J.]

### X. MEASURE OF DAMAGES.

7. *Infringement—Judgment for Patentee—Subsequent Discovery of Instances of Prior User—Petition by Infringer for Revocation of the Patent—Judgment for Revocation—Right of Patentee to Damages for Infringement.*—In an action for infringement of a patent the plaintiff obtained judgment for an injunction and for damages. Subsequently the defendants discovered instances of prior user of which they had been ignorant at the trial, and they petitioned for revocation of the patent, and on that petition they obtained revocation of the patent.

HELD—that, notwithstanding the revocation of the patent, the defendants were estopped from denying the validity of the patent at the date of the trial of the action for infringement, and that,

### X. Measure of Damages—Continued.

therefore, the plaintiff was entitled to damages for the infringement.

Decision of Parker, J. (77 L. J. Ch. 586; 24 T. L. R. 717; 25 R. P. C. 529) affirmed.

POULTON *v.* ADJUSTABLE COVER AND BOILER [BLOCK CO., [1908] 2 Ch. 430; 77 L. J. Ch. 780; 99 L. T. 647; 24 T. L. R. 782; 52 Sol. Jo. 639; 25 R. P. C. 661—C. A.

### XI. ACTION TO RESTRAIN THREATS.

[No paragraphs in this vol. of the Digest.]

### XII. PRACTICE.

#### (1) Costs.

8. *Leave to Amend Particulars of Objections—Costs of Particulars on Plaintiffs Electing to Discontinue their Action—Form of Order—Patents, Designs, and Trade Marks Act, 1883* (46 & 47 Vict. c. 57), s. 29 (6)—*Patents and Designs Act, 1907* (7 Edw. 7, c. 29), s. 98 (b)—*R. S. C., Ord. 53A, r. 22*.—In an action by patentees for infringement of their patent the defendant, having already delivered a defence and particulars of objection, applied to the District Registrar of B. for leave to amend his defence and particulars of objection, and obtained an order in the usual form giving him leave on the terms (*inter alia*) that the plaintiffs might within a certain time elect whether they would discontinue the action. Under sect. 29 (6) of the Patents, Designs, and Trade Marks Act, 1883, the defendant, in the event of the plaintiffs discontinuing the action, would only have been allowed the costs of such particulars of objection as the Court or a judge should certify as proven or as reasonable and proper. But under r. 22 of Ord. 53A, regulating the procedure under the Patents and Designs Act, 1907, by which sect. 29 (6) of the Act of 1883 is repealed, it is provided that, subject to the old rule applying when an action proceeds to trial, the costs of particulars of objections shall be left in the discretion of the taxing-master. The plaintiffs now moved the Court to vary the order of the District Registrar so that the defendant should be precluded, in the event of the plaintiffs discontinuing the action, from obtaining the costs of the original particulars of objections which he had abandoned.

HELD—that the form of order made was right and that the matter ought to be left to the discretion of the taxing-master, as there was an obvious disadvantage in dealing with it in Court.

ATKINSON *v.* BRITTON. [1909] W. N. 102—[Neville, J.]

#### (2) In General.

9. *Particulars of Objections as to Alleged Prior User—Identification—Distinction between Machinery and Process—R. S. C., Ord. 53A, r. 18*.—Order 53A, r. 18, which deals with particulars of objections as to prior user, requires great detail where the patent is one for machinery or apparatus. But where a patent is merely for a process all that the rule requires is a description sufficient to identify the alleged prior user.

And in such a case the possibility that some expense may be saved does not justify the Court in treating samples as machinery or apparatus, and ordering the defendants to give inspection, if possible, of such samples.

Decision of Eady, J., reversed. Decision of Neville, J., affirmed.

MINERALS SEPARATION, LD. *v.* ORE CONCENTRATION CO., LD., [1909] 1 Ch. 744; 78 L. J. Ch. 604; 100 L. T. 753; 26 R. P. C. 413—C. A.

10. *Prior User—Particulars of Objections—Identification of Instances of Prior User—Machine no Longer in Use—Inspection—Form of Order—R. S. C., Ord. 53A, r. 18*.—In Ord. 53A, r. 18, dealing with particulars of objections as to prior user, the important words are “sufficient to identify such prior user.”

In an action by patentees for infringement of their patent for improvements in fire-bars for furnaces, the plaintiffs applied that the defendants should be ordered to deliver further particulars, with descriptions and drawings of the instances of prior user alleged in the defendants’ particulars of objections, and should be precluded from giving evidence at the trial of any other instances.

HELD—that an order should be made for further particulars containing a description, with drawings if necessary, of one alleged instance of prior user where the fire-bars were not now in use, the defendants undertaking to point out *in situ* to the plaintiffs or their agents, on a day or days fixed, the other alleged instances of prior user and to do their best to secure an opportunity for the plaintiffs to have full inspection.

CROSTHWAITE FIRE-BAR SYNDICATE *v.* SENIOR, [1909] 1 Ch. 801; 78 L. J. Ch. 417; 100 L. T. 646; 26 R. P. C. 260—Parker, J.

Affirmed on appeal (see [1909] W. N. 202)—C. A.

11. *Infringement—Action—Defence—Necessity for Averment of Particulars in which Specification Insufficient or Misleading.*

HELD—that the defender in an action of interdict against the infringement of a patent was not entitled to maintain that the patent was invalid in respect that the specification did not sufficiently describe and ascertain the nature of the invention and the manner in which it was to be performed, or that the specification was ambiguous and calculated to mislead, without stating these pleas on record and averring specifically and in detail the various respects in which the specification failed to describe sufficiently the nature of the invention and the manner in which it was to be performed, or was otherwise ambiguous or misleading.

WATSON, LAIDLAW & CO., LD. *v.* FOTT, CASSELS, AND WILLIAMSON. 46 Sc. L. R. 348; 26 R. P. C. 349—Ct. of Sess.

#### (3) Interlocutory Injunctions.

[No paragraphs in this vol. of the Digest.]

XII. Practice *Continued.*

## (4) On Petition for Revocation.

**12. Appeal from Comptroller's Decision—Fresh Evidence on Appeal.**—The Court, at the hearing of an appeal from the decisions of the Comptroller-General of Patents revoking two patents on the ground of inadequate working in the United Kingdom, admitted evidence which was not before the Comptroller, but intimated that this was not to be taken as a precedent governing other cases.

IN RE BREMER'S PATENT, EX PARTE BRAULIK; IN RE HÖGNER'S PATENT, EX PARTE BRAULIK, 101 L. T. 21; 25 T. L. R. 610; 26 R. P. C. 149—Parker, J.

## XIII. COMMITTAL.

[No paragraphs in this vol. of the Digest.]

## XIV. PATENT AGENTS.

[No paragraphs in this vol. of the Digest.]

## XV. MISCELLANEOUS CASES OF INFRINGEMENT.

## (1) Colourable Imitations, etc.

[No paragraphs in this vol. of the Digest.]

## (2) Exposure Without Intention of Sale.

[No paragraphs in this vol. of the Digest.]

## (3) Importation and Infringement by Foreigner.

[No paragraphs in this vol. of the Digest.]

## (4) Repairs Constituting new Article.

[No paragraphs in this vol. of the Digest.]

## (5) Other Cases.

**13. Interpretation of Specification—Core of Golf Ball—“Liquid or Semi-liquid”—Gelatine—Infringement by Licensees—Damages.**—A patentee having obtained a patent for making golf balls with an incompressible fluid core, entered into an agreement with sole licensees for their manufacture and sale, the latter contracting to do their utmost to further their sale and to sell them at 19s. a dozen. In his specification the patentee described the incompressible fluid as “such as water or other liquid or semi-liquid.” The licensees after a time ceased to follow the patentee's instructions, namely, to make water-core balls, and made balls with a core of gelatine mixed with water, selling them for 18s. a dozen, and claiming to pay no royalty.

**HELD**—that the specification was intended to describe not only such liquids as water but also sticky substances such as glycerine or gelatine mixed with water; that therefore the manufacture and sale of the gelatine core balls was an infringement of the patent; and that the licensees were liable to pay damages in lieu of royalties on the gelatine-core balls admitted to have been sold by them.

Decision of the First Division of the Court of Session (25 R. P. C. 757) reversed.

ROGER v. J. P. COCHRANE & CO., [1909] A. C. 285; 78 L. J. P. C. 121; 26 R. P. C. 591

H. L.

**14. Purchase of Infringing Mechanism—Mechanism not Actually Used by Purchaser.**

The plaintiffs sued the defendants in respect of an alleged infringement of their patent granted for certain mechanism, which was adapted for use in connection with, and as part of, a complex machine, but could be detached without impairing the efficiency of the machine for other purposes. The defendants purchased two machines containing the alleged infringing mechanism, but they never used that particular mechanism, the essential parts of which had been actually detached from the rest of the machine while in the defendants' possession. The defendants attacked the validity of the plaintiffs' patent on the grounds of want of novelty and want of subject-matter. Parker, J., having dismissed the action on the ground that the patent was invalid, the plaintiffs appealed.

**HELD** (Buckley, L.J., dissenting), without expressing any opinion as to the validity of the patent—that in the circumstances there had been no infringement by the defendants of the plaintiffs' patent.

Decision of Parker, J. (25 T. L. R. 74; 26 R. P. C. 21), affirmed on different grounds.

THE BRITISH UNITED SHOE MANUFACTURING [Co., LD. v. SIMON COLLIER, LD., 25 T. L. R. 415; 26 R. P. C. 534—C. A.

## XVI. REVOCATION.

**15. Patented Process Carried on Exclusively or Mainly Outside the United Kingdom—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 27.**—Sect. 27 of the Patents and Designs Act, 1907, is meant to hit any abuse of a monopoly the object or result of which is to benefit foreigners at the expense of the traders within the United Kingdom. If a patented article is manufactured in the United Kingdom to as great an extent as can reasonably be expected having regard to the industrial development of other countries, no presumption against the patentee arises under sect. 27. The word “mainly” in sub-sect. 1 of the section is used in close connection with, and as an alternative to, the word “exclusively,” and having regard to that fact a process or article cannot be said to be mainly carried on or manufactured abroad merely because it is carried on or manufactured abroad to a somewhat greater extent than within the United Kingdom. The sub-section institutes a comparison between the extent to which the article or process, the subject of the patent, is manufactured or carried on in this country and the extent to which it is manufactured or carried on abroad, whether the articles so manufactured or resulting from the process so carried on abroad are or are not imported into this country. No reasons given by the patentee under sub-sect. 2 of sect. 27 can be considered satisfactory which do not account for the inadequacy of the extent to which the patented article is manufactured, or the patented process is carried on, in this country by causes operating irrespective of any abuse of the monopoly granted by the patent. The demand and supply in this country are to be considered though they are not the only facts to be considered



**XVI. Revocation—Continued.**

on the question of adequacy. Observations on the Patent Rules.

IN RE HATSCHKE'S PATENT; EX PARTE  
[ZERENNER, [1909] 2 Ch. 68; 78 L. J. Ch.  
402; 100 L. T. 809; 25 T. L. R. 457; 26  
R. P. C. 228—Parker, J.]

**PAUPERS.**

*See* LUNATICS; POOR LAW: PRACTICE  
AND PROCEDURE.

**PAWNBROKERS AND  
PLEDGES.**

[No paragraphs in this vol. of the Digest.]

**PAYMENT INTO COURT.**

*See* PRACTICE.

**PAYMENTS, APPROPRIA-  
TION OF.**

*See* BANKERS AND BANKING: CON-  
TRACTS; MONEY; MORTGAGES.

**PEDIGREE.**

*See* DIGNITIES; EVIDENCE; SALE OF  
LAND.

**PEDLARS.**

*See* MARKETS AND FAIRS.

**PENALTY.**

*See* CRIMINAL LAW AND PROCEDURE.  
DAMAGES.

**PENSION.**

*See* ROYAL FORCES.

**PERJURY.**

*See* CRIMINAL LAW AND PROCEDURE.

**PERPETUATING TESTI-  
MONY.**

*See* EVIDENCE.

**PERPETUITIES.**

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*See also* CHARITIES; RAILWAYS, No. 2;  
WILLS, No. 41.

**I. ACCUMULATIONS.**

*See also* WILLS, No. 60.

1. *Will—Conversion—Proceeds of Realty Sold Under a Power—Accumulations of Income Beyond the Legal Limit—Intestacy—Resulting to Heir-at-Law—Thellusson Act* (39 & 40 Geo. 3. c. 98).—A testator devised real estate to his trustees, with a power of sale, upon trust to accumulate the rents and income until his son should attain the age of twenty-five years. The trustees sold the real estate and invested the proceeds in personal property. The son had not attained the age of twenty-five years at the expiration of the statutory period allowed for accumulations.

**HELD**—that an intestacy having occurred as to the income between the statutory period and the date when the son would attain twenty-five years of age, the income resulted to the son as heir-at-law.

IN RE PERKINS, DECEASED, BROWN *v.* PERKINS,  
[101 L. T. 345; 53 Sol. Jo. 698—Neville, J.]

**II. PERPETUITIES.**

2. *Rule Against "Double Possibilities"—Application of Rule to Equitable Interests.*—The rule against the limitation of land to an unborn child with remainder to the latter's unborn child applies alike to legal remainders and equitable interests.

The phrase "possibility upon a possibility," should not be used.

Decision of Eve, J. ([1909] 2 Ch. 450; 78 L. J. Ch. 657; 101 L. T. 153; 25 T. L. R. 688; 53 Sol. Jo. 651) affirmed.

IN RE NASH, COOK *v.* FREDERICK, [1909] W. N.  
[209; 26 T. L. R. 57; 54 Sol. Jo. 48—C. A.]

**PERSONAL PROPERTY.**

*See* INFANTS, No. 5; TRUSTS, No. 10.

**PETITION OF RIGHT.**

*See* DEPENDENCIES, No. 21.

**PETROLEUM.**

See EXPLOSIVES.

**PHYSICIANS.**

See MEDICINE AND PHARMACY.

**PIERS.**

See SHIPPING AND NAVIGATION ;  
WATERS AND WATERCOURSES.

**PILOTS.**

See SHIPPING AND NAVIGATION.

**PISTOLS.**

1. *Sale of Pistol—Householder—Statement by Purchaser and Police Officer or Justice of the Peace—Pistols Act, 1903 (3 Edw. 7, c. 18), s. 3.*—By sect. 3 of the Pistols Act, 1903, where a person desiring to purchase a pistol is a householder who purposes to use the pistol only in his own house or the curtilage thereof, it is necessary not only that he should give reasonable proof of those facts to the seller, but also that he should produce a statement to the same effect signed by himself and a police officer or by himself and a justice of the peace.

MATTHEWS v. GRAY, [1909] 2 K. B. 89; 78 [L. J. K. B. 545; 100 L. T. 907; 73 J. P. 303; 25 T. L. R. 476—Div. Ct.

**PLANS.**

See BUILDERS: EVIDENCE: METROPOLIS: PUBLIC HEALTH.

**PLAY.**

See COPYRIGHT: THEATRES.

**PLEADING.**

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See also ADMIRALTY, No. 3; LIBEL, Nos. 5, 6; PRACTICE; TRADE MARKS, No. 13.

**I. MISCELLANEOUS.**

[No paragraphs in this vol. of the Digest.]

**II. STRIKING OUT PLEADINGS.**

1. *Action on Promissory Notes—Evidence of Fraud—Striking Out on the Ground of Embarrassment—Bonâ fide Holders for Value.*—In an action on two promissory notes the defendant pleaded that for a long period he had been under the improper influence of certain persons who had fraudulently conspired to obtain large sums of money from him, and that the two notes sued on were so obtained from him. He did not allege that the plaintiffs were parties to this fraud, or were other than *bonâ fide* holders of the notes in due course of business. With his defence he delivered particulars of these other numerous transactions. The plaintiff moved that all these particulars should be struck out, and the Master ordered the defendant to deliver fresh particulars confined to the fraud involved in the inception of the two promissory notes sued on. The order of the Master was affirmed by Ridley, J., and reversed by the Court of Appeal.

HELD—that the order of the Master should be restored.

*Per* Lord James of Hereford: Although the order directing that the particulars should stand as originally delivered was wrong, it was not to be understood from the fact that this House restored the order of the Master that the defendant must not at the trial give evidence of the whole history of the alleged fraudulent conspiracy.

Decision of C. A. reversed.

STAFFORDSHIRE FINANCIAL CO., LD. v. HILL.  
[53 Sol. Jo. 446—H. L.]

2. *Striking out Statement of Claim—R. S. C., Ord. 25, r. 4.*—The statement of claim in an action against the members of the Army Council for wrongfully procuring the plaintiff's dismissal from the army, or, alternatively, for having wrongfully coerced and intimidated him into resigning his commission, struck out on the ground that it disclosed no reasonable cause of action.

WOODS v. LYTTELTON AND OTHERS, 25 T. L. R. 665—C. A.

**III. RAISING POINTS OF LAW.**

[No paragraphs in this vol. of the Digest.]

**IV. DEFAULT OF DEFENCE.**

3. *Motion for Judgment—Practice—Claim for Damages and Injunction—Injunction Granted—R. S. C., Ord. 27, r. 11.*—On a motion for judgment in default of defence in an action

IV. Default of Defence—*Continued.*

wherein the plaintiffs claimed damages for libel and an injunction, the Court granted the injunction without evidence on the plaintiffs electing to waive the claim for damages.

DYKES AND OTHERS *v.* THOMSON, [1909] W. N. [104—Hamilton, J.]

## V. PARTICULARS.

4. *Motion for Particulars—Contributory Negligence—Ordinary Running Down Case.*—In an ordinary running down case, where the defendant pleads contributory negligence, an order for particulars of the contributory negligence so alleged should not be made, without special reason.

*Martin v. M'Taggart* ([1906] 2 I. R. 120; 40 I. L. T. 12) considered and not approved.

TOPPIN *v.* BELFAST CORPORATION, [1909] 2 I. R. [181; 43 I. L. T. 8—C. A., Ireland.]

## VI. SPECIAL PLEAS.

5. *Defence not Specifically Pleased—Surprise—Inevitable Accident—Action Claiming Damages for Negligence—Denial of Negligence—R. S. C., Ord. 19, r. 15.*—Where in an action claiming damages for negligence the defendant by his statement of defence denies negligence he may give evidence that the accident upon which the claim is based was an inevitable accident. In such a case the defence of inevitable accident need not be specifically pleaded.

*The Dowager Countess of Winchelsea v. Beckly* ((1886) 2 T. L. R. 300—Huddleston, B.) disapproved.

Decision of Sutton, J., affirmed.

RUMBOLD *v.* LONDON COUNTY COUNCIL AND [ANOTHER, 25 T. L. R. 541; 53 Sol. Jo. 502—C. A.]

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See PAWNBROKERS AND PLEDGES.

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## POOR LAW.

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## I. IN GENERAL.

1. *Dissolution of Union—Union Formed Under Local Act—Power of Local Government Board—Separating Parishes from Existing Union—Uniting Parishes*—13 Geo. 3, c. 50—*Poor Law Amendment Act, 1834* (4 & 5 Will. 4, c. 76), ss. 26, 32, 109; 1844 (7 & 8 Vict. c. 101), s. 64, and 1867 (30 & 31 Vict. c. 106), s. 2—*Divided Parishes and Poor Law Amendment Act, 1876* (39 & 40 Vict. c. 61), s. 11.—The Local Government Board have power, under sect. 11 of the Divided Parishes and Poor Law Amendment Act, 1876, by order to dissolve a union formed under a local Act. Sect. 64 of the Poor Law Amendment Act, 1844—which provides that, where the relief of the poor has been administered in any parish, whose population exceeds 20,000, by guardians appointed under a local Act, it shall not be lawful for the Commissioners (now the Local Government Board), without the consent in writing of two-thirds of the guardians, to declare such parish to be united with any other parish for the relief of the poor—applies only where the relief has been administered by guardians under a local Act for that parish, and not by the guardians of the union of which the parish forms part.



## I. In General—Continued.

Decision of C. A. (24 T. L. R. 502) reversed in part.

Decision of C. A. *sub nom. R. v. Local Government Board, Ex parte South Stoneham Union* ([1908] 2 K. B. 368; 77 L. J. K. B. 820; 99 L. T. 69; 72 J. P. 219; 24 T. L. R. 502) reversed.

LOCAL GOVERNMENT BOARD *v.* SOUTH STONEHAM UNION, [1909] A. C. 57; 78 L. J. K. B. 121; 99 L. T. 896; 73 J. P. 57; 25 T. L. R. 100; 7 L. G. R. 167—H. L.

## II. MAINTENANCE.

### (a) Recovery of Relief.

#### (i.) From Pauper.

**2. Expense of Maintenance in Infirmary—Basis of Calculation.**—The amount properly payable in respect of the maintenance of a pauper in an infirmary is the reasonable expenditure incurred by the guardians in respect of such maintenance for the time the pauper is an inmate of the infirmary. Such expenditure is to be calculated upon the basis that such pauper, with the other inmates during that period, should bear the cost of (a) maintenance, comprising provisions, necessities, such as soap, coals, gas, water and the like, and clothing; (b) salaries, rations, and uniforms of the officers of the infirmary; (c) repairs, wages of carpenter, engineer, stokers, and temporary workmen, furniture, printing, insurance, and parochial rates on infirmary; and (d) a charge in respect of the capital cost of the infirmary site and buildings.

ISLINGTON BOARD OF GUARDIANS *v.* BIGGEN—[DEN, 101 L. T. 677; 26 T. L. R. 44; 7 L. G. R. 1159—Bray, J.

#### (ii.) From Persons Liable.

**3. Adoption of Child—Adultery of Father—Resolution of Guardians—Determination—Order of Maintenance—Poor Law Act, 1899 (62 & 63 Vict. c. 37), s. 1.**—A girl of about four years of age having become chargeable to the H. guardians, and it having been ascertained that the father had for some time past been guilty of adulterous intercourse, the guardians passed a resolution, under sect. 1 of the Poor Law Act, 1899, adopting the child. Upon the hearing of a complaint made by the father that the resolution should be determined:

Held—that there was ground under the above section for the resolution, and that it was not for the benefit of the child that the resolution should be determined; and that an order of maintenance should be made upon the father in respect of the child.

HACKNEY UNION *v.* TOMBS; TOMBS *v.* HACKNEY UNION, 73 J. P. 271—North London Police Court.

**4. Outdoor Relief—Person Capable of Light Work Classed as "Not Able-bodied"—Discretion of Guardians—Liability of Son under Agreement with Guardians—Onus of Proof that Discretion**

*Wrongly Exercised—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 7—Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 52.*—The fact that a pauper is capable of doing some work does not necessarily constitute him an able-bodied person, and the fact that he is incapable of doing full work does not necessarily constitute him a not able-bodied or infirm person.

Where a son has agreed with guardians to contribute to the support and maintenance of his father "for and during so long a time as he shall be chargeable to the common fund of the said union," and the father, at the time he commences to be so supported and his son commences to contribute, is so chargeable, in an action for arrears under the agreement the onus is upon the son to prove that the discretion of the guardians in classing his father as still chargeable has been wrongly exercised. Proof of the mere fact that when his father was receiving 12s. a week out-relief from the guardians he was doing light work at a baker's, for which he received 13s. a week, some bread and an occasional meal, does not necessarily discharge that onus.

BARNET UNION *v.* TILBURY, 73 J. P. 466; [7 L. G. R. 993—Div. Ct.

**5. Running Away and Leaving Wife or Child Chargeable—Period within which Proceedings may be Taken—Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 19.**—The period of two years prescribed by sect. 19 of the Poor Law Amendment Act, 1876, as that within which proceedings may be taken against a person who runs away and leaves his wife or his or her child chargeable to any union, begins to run at the time when the offender absconds, and, therefore, such proceedings cannot be commenced after the expiration of two years from that date.

ASHLEY *v.* BLAKER, 101 L. T. 682; 73 J. P. 495—Div. Ct.

#### (iii.) In General.

[No paragraphs in this vol. of the Digest.]

### (b) Pauper Lunatics.

#### (i.) Recovery of Relief.

See Nos. 7, 8, *infra*; LUNATICS, Nos. 4, 5.

#### (ii.) Weekly Sum.

[No paragraphs in this vol. of the Digest.]

### (c) Bastards.

[No paragraphs in this vol. of the Digest.]

## III. OVERSEERS.

**6. Appointment of Solicitor—Claim to Exemption—Writ of Privilege—Appeal to Quarter Sessions—District Council as Respondents—No Appearance by Respondents—Order against Council for Costs—Poor Relief Act, 1601 (43 Eliz. c. 2), s. 5.**—A practising solicitor was appointed overseer of the poor by an urban district council, under the powers conferred by an order of the Local Government Board made under sect. 33 (1) of the Local Government Act, 1894. He claimed exemption, and the council made another appointment which the board of guardians refused to recognise unless the first appointment were quashed. The solicitor appeared to quarter

### III. Overseers—Continued.

sessions, as a person aggrieved within sect. 5 of the Poor Relief Act, 1601, and he served notice of appeal on the district council. Quarter sessions allowed the appeal, with costs against the district council. The district council did not appear at quarter sessions, or oppose the appeal.

HELD—that though the solicitor might have sued out a writ of privilege in the High Court, he was entitled to appeal to quarter sessions, but that as he was only claiming an exemption and there was no real question raised between him and the district council, and they did not appear to oppose the appeal, quarter sessions ought not to have condemned the council in the costs of the appeal.

R. v. DERBYSHIRE JUSTICES. EX PARTE NEW [MILLS URBAN DISTRICT COUNCIL, [1909] 1 K. B. 449; 78 L. J. K. B. 288; 100 L. T. 453; 73 J. P. 147; 25 T. L. R. 252; 7 L. G. R. 355—Div. Ct.]

### IV. SETTLEMENT AND REMOVAL.

#### (a) Derivative Settlement.

[No paragraphs in this vol. of the Digest.]

#### (b) Divided Parishes.

[No paragraphs in this vol. of the Digest.]

#### (c) Husband and Wife.

[No paragraphs in this vol. of the Digest.]

#### (d) Settlement by Residence.

7. *Pauper Lunatic—Order Adjudicating Settlement—Grounds—Amendment—Case for High Court—Lunacy Act, 1890* (53 Vict. c. 5), ss. 289, 302, 307, 310.]—The grounds of adjudication accompanying an order of justices under sect. 289 of the Lunacy Act, 1890, adjudicating the settlement of a pauper lunatic to be in the parish of L., in the E. Union, stated that the lunatic resided in the parish of L. for three years and upwards, namely, from February, 1892, to about February, 1896. Evidence was given by the union obtaining the order that the lunatic had resided continuously in the parish of L. for a period of four years from April, 1890; but it was not shown that the lunatic had resided in the parish of L. for a period of three years within the times mentioned in the grounds of adjudication.

HELD—that the Court were empowered by sect. 307 of the Lunacy Act, 1890, to amend the grounds of adjudication so as to let in the residence prior to February, 1902, and that in the circumstances the grounds should be so amended.

HELD ALSO—that the Court were debarred by sect. 310 of the Lunacy Act, 1890, from stating a case upon the point for the opinion of the High Court.

EPHING UNION v. CANTERBURY UNION, 73 J. P. [411—Qr. Sess.]

8. *Pauper Lunatic—Order Adjudicating Settlement—Mistake—Supersession—Abandonment.*—On October 1st, 1907, upon the application of the guardians of the parish of H., an order was made

by two justices adjudicating the settlement of a lunatic then chargeable to the guardians of the parish of H. to be in the parish of L. The application for the order was made upon a mistake of fact, and the order was not served upon the guardians of the parish of L., nor was it formally abandoned.

On January 9th, 1908, the guardians of the parish of H. applied for and obtained an order of justices adjudicating the settlement of the lunatic to be in the parish of W., in the W. Union.

HELD—that the existence of the order dated October 1st, 1907, did not render invalid the order dated January 9th, 1908.

WANDSWORTH UNION v. HAMMERSMITH [PARISH, 73 J. P. 368—County of London Sessions.]

9. *Receipt of Relief—Medical Advice—Poor Removal Act, 1846* (9 & 10 Vict. c. 66), s. 1—*Divided Parishes and Poor Law Amendment Act, 1876* (39 & 40 Vict. c. 61), s. 34.]—Where a person applied to the relieving officer of the parish in which she was residing for an order to the medical officer to afford her medical advice and treatment, and such person was thereupon seen and examined by the medical officer, who advised her to go into the parish workhouse infirmary, but gave her no medicine or other assistance except a written order for her admission into the infirmary, and she did not use such order nor seek or obtain any further help from the parish officers, it was

HELD—that she did not receive "relief" within the meaning of the first proviso to sect. 1 of the Poor Removal Act, 1846.

BETHNAL GREEN UNION v. WEST HAM UNION, [73 J. P. 460—Qr. Sess.]

10. *Removability—Illegitimate Child Under Sixteen—Three Years' Residence Apart From Mother—Poor Removal Act, 1846* (9 & 10 Vict. c. 66), s. 1; *Poor Removal Act, 1848* (11 & 12 Vict. c. 111), s. 1; *Divided Parishes and Poor Law Amendment Act, 1876* (39 & 40 Vict. c. 61), s. 34.]—An illegitimate child, aged one month, was put out to nurse by its mother, and such child thereafter resided continuously for more than three years in the parish of L., in the W. H. Union, and then became chargeable. The mother never resided in such parish, nor in any part of the W. H. Union, during the period of the child's residence there.

HELD—that the child was, notwithstanding it was illegitimate, not irremovable by virtue of its residence in L., inasmuch as the mother would have been removable during the whole of such residence.

HAMPSTEAD GUARDIANS v. WEST HAM UNION, [73 J. P. 492—Qr. Sess.]

#### (e) In General.

11. *Appeal—Next Practicable Sessions—Form of Notice—Poor Law Amendment Act, 1834* (4 & 5 Will. 4, c. 76), s. 81—*Poor Law Procedure Act, 1848* (11 & 12 Vict. c. 31), s. 9.]—Two justices for Norfolk having made an order on Feb-

#### IV. Settlement and Removal—Continued.

ruary 26th, 1908, for the removal of certain paupers from the W. Union to the F. Union, notice of chargeability and statement of the grounds of removal having been sent to the guardians of the F. Union on February 26th, 1908, and a copy of the depositions having been sent to them on March 18th, 1908, the clerk to the guardians of the F. Union wrote on March 31st, 1908, to the clerk to the guardians of the W. Union giving notice of appeal, but not stating to what Court. Quarter sessions for Norfolk were held on April 8th, 1908, but neither party attended, and the appeal was not entered and respited at those sessions. The next quarter sessions for Norfolk were held on July 1st, 1908, and on the appeal coming on at these sessions objection was taken on behalf of the W. Union that the next practicable quarter sessions were the sessions of April 8th, 1908, but quarter sessions decided that the next practicable quarter sessions were those of July 1st, 1908, and they made an order allowing the appeal.

**HELD**—that it was for the magistrates at the quarter sessions of July 1st, 1908, to decide what were the next practicable quarter sessions, and that there being no evidence that they had exercised their jurisdiction wrongly, the Court would not quash their order.

**HELD ALSO**—that as the notice of appeal was treated by both parties as a notice for the July sessions, it could not now be objected to on the ground that it applied only to the April sessions. *R. v. NORFOLK JUSTICES, EX PARTE WAYLAND [UNION, [1909] 1 K. B. 463; 78 L. J. K. B. 236; 99 L. T. 936; 73 J. P. 36; 7 L. G. R. 343—Div. Ct.*

**12. Removal of Irish-born Pauper—Appeal—Liable to be Removed to Ireland—Order for Removal to Wrong Union—Right of Appeal—Poor Removal Act, 1845 (8 & 9 Vict. c. 117), s. 2—Poor Removal (No. 2) Act, 1861 (24 & 25 Vict. c. 76), s. 2—Poor Removal Act, 1863 (26 & 27 Vict. c. 89), s. 7.]**—An appeal will not lie against an order for the removal to Ireland of an Irish-born pauper unless it be proved either that the pauper was settled in, or irremovable from, England, or that the pauper was not liable to be removed to any place in Ireland.

Therefore an appeal cannot succeed where a pauper has been ordered to be removed to L. in Ireland, if the pauper was in fact liable to be removed to Ireland but to a different union.

**LOCAL GOVERNMENT BOARD FOR IRELAND v. [BLACKBURN UNION, [1909] 1 K. B. 454; 78 L. J. K. B. 301; 99 L. T. 835; 72 J. P. 514; 25 T. L. R. 100; 53 Sol. Jo. 97; 7 L. G. R. 1—Div. Ct.]**

#### V. VAGRANCY AND OTHER OFFENCES.

[No paragraphs in this vol. of the Digest.]

### POOR PRISONERS' DEFENCE ACT, 1903.

*See CRIMINAL LAW AND PROCEDURE.*

### PORT AND PORT DUES.

*See SHIPPING AND NAVIGATION.*

### POST OFFICE.

*See RAILWAYS, No. 32.*

### POWER OF ATTORNEY.

*See AGENCY.*

### POWER OF SALE.

*See BANKERS; MORTGAGES; TRUSTS; WILLS.*

### POWERS.

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*And see CONFLICT OF LAWS; DEATH DUTIES; EXECUTORS; HUSBAND AND WIFE; PERPETUITIES, SETTLEMENTS; WILLS.*

#### POWER OF APPOINTMENT.

*See also HUSBAND AND WIFE, Nos. 8, 9; MISTAKE, No. 1; SETTLEMENTS, No. 8.*

##### (a) Construction.

[No paragraphs in this vol. of the Digest.]

##### (b) Exercise.

**1. General Testamentary Power—Provision for "Express Reference."]**—B. had power to appoint funds by will "expressly referring to this power."

**HELD**—that the words "over which I shall have any power of disposition by will" contained in her will were a sufficient reference to operate as an execution.

*In re Waterhouse* ((1908) 77 L. J. Ch. 30; 98 L. T. 30—C. A.) applied.

**IN RE LANE, BELLI v. LANE, [1908] 2 Ch. 581; [77 L. J. Ch. 774; 99 L. T. 693—Eady, J.]**



**Power of Appointment—(Continued).**

**2. Power of Appointment by Will during Coverture—Exercise of Power during Coverture—Death while Discoverd.]**—A power given to a married woman to appoint by will during coverture is validly exercised by a will executed by her during coverture, although at the date of her death, when the will came into operation, she was discoverd.

IN RE ILLINGWORTH, DECEASED. BEVIR *v.* [ARMSTRONG, [1909] 2 Ch. 297; 78 L. J. Ch. 701; 101 L. T. 104; 53 Sol. Jo. 616—Eve, J.]

**3. Special Testamentary Powers—Exercise by Will—Later Will—No Express Revocation—Whether a later Will an Exercise of Power.]**—W., the donee of a special power of appointment, made a will by which she expressly exercised the power. Later, she executed a holograph will in these terms: "I wish to leave at my death everything I have power to will to my husband."

HELD—that she meant to and did exercise her power by the later will, and that it revoked the earlier will.

In *re Weston's Settlement*, *Neeves v. Weston* ([1906] 2 Ch. 620; 95 L. T. 581—Buckley, J.), applied.

WRIGLEY *v.* LOWNDES, [1908] P. 348; 77 L. J. [P. 148; 99 L. T. 879—Barnes, Pres.]

**4. English Testamentary Power—Execution by Foreign Subject—Will Invalid by Foreign Law—Admissibility to Probate.]**—Where a person domiciled abroad has an English power of appointment by will, a will executed by him in English form may, notwithstanding that it is not validly executed according to the law of his domicile, be admitted to probate as a will for the purpose of the appointment although it may not be admissible for other purposes.

Decision of C. A. of Ireland affirmed.

MURPHY *v.* DEICHLER AND OTHERS, [1909] [A. C. 446; 78 L. J. P. C. 159; 101 L. T. 143; 25 T. L. R. 719; 53 Sol. Jo. 671; 43 I. L. T. 235—H. L.]

**5. Fraud on Power—Appointment on Condition—Bargain.]**—A lady had power under her marriage settlement to appoint to one or more of her children exclusively of the other or others of them. She had two children, a son and a daughter, and she appointed the whole property to the daughter on condition that the daughter settled the property as to one moiety on herself and her children and as to the other moiety on the son, his wife, and children.

HELD—that the appointment was a fraud upon the power.

KNOWLES *v.* MORGAN, 54 Sol. Jo. 117—Eve, J.

**6. Exercise of Power in Married Woman's Will Made During Coverture—Cessation of Coverture—Property Becoming Vested in Testatrix Absolutely—Intentions of Testatrix—Appointments Operating as Bequests—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24—Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3.]**—A testatrix

made her will in 1895, during the lifetime of her husband, and therein exercised a power of appointment given to her by her marriage settlement, dated 1861, in respect of the funds comprised in the settlement. In exercising the power she used the usual words "and of all other powers (if any) hereunto enabling me." By the death of her husband in 1905, without leaving any issue of the marriage, she became, by the terms of the settlement, absolutely entitled to the settled property. She died in 1908 a lunatic, without having revoked, altered, or republished her will.

HELD—that the appointments made by the will were clear intentions of the testatrix to dispose of the settled property; that the effect of sect. 3 of the Married Women's Property Act of 1893 was to make those appointments valid dispositions of the funds in question, notwithstanding the testatrix having subsequently become absolutely entitled; that the words "all other powers hereunto enabling me" were applicable to the power given by the Act of 1893, and that the case was not affected by the lady becoming a lunatic.

IN RE JAMES, HOLE *v.* BETHUNE, [1909] W. N. [236; 101 L. T. 625—Joyce, J.]

**(c) Release.**

**7. Testamentary Power—Release Inter Vivos—Release in Part—Agreement Not to Exercise the Power—Validity and Effect of Release and Agreement.]**—The donee of a testamentary power of appointment over settled funds among her children and issue agreed with two of her sons that she would not exercise the power so as to reduce the share of either to less than £7,000, and that the sum should vest in possession upon her decease, and with one of these sons that his share should be at least £7,000, and she agreed with a third son that she would so far release her power and so far contract not to exercise it that his share should be at least £7,000. By her will she appointed and settled the trust funds so that none of the three sons would be entitled in possession to his share.

HELD (applying the principle in *Davies v. Huguenin* (1 H. & M. 730), but for the reason only that the principle had been adopted by long settled practice)—that the three sons were entitled in possession to £7,000 each, less advances respectively made to them out of and in respect of such sums.

HELD ALSO—that the power was not otherwise affected.

IN RE EVERED, MOLINEUX *v.* EVERED, 54 [Sol. Jo. 83—Neville, J.]

**8. Settlement—Tenant for Life—Power to Appoint Further Portions—Disentailing Deed Subject to Anterior Estates and Powers Annuled Thereto—Mortgages—Covenants for Title Including Indemnity Against Portions—Subsequent Appointment of Portions—Priority of Portions Over Mortgages.]**—By a marriage settlement made in 1832 certain estates were limited to the use of A. for life, remainder to the use of trustees for a term of 600 years to secure £20,000 as

**Power of Appointment—Continued.**

portions for younger children, remainder to B., the eldest son of A., in tail male, with remainder over. The settlement contained a power for A. by deed and will to appoint a further sum of £10,000 as portions for younger children.

In 1854 B. executed a disentailing deed (in which A. joined as protector of the settlement) by which the estates were granted (subject to the several uses, estates, and charges created by the settlement anterior to the limitations in favour of B.'s estate tail, and to all powers and privileges to such precedent estates annexed) to such uses as A. and B. might jointly appoint. A. and B. in exercise of such power created mortgages on the estates, and entered into the usual covenants for title, with an indemnity (*inter alia*) against portions. A. by his will charged the estates with a further sum of £10,000 for portions, and died in 1896.

In 1909 questions arose as to the priorities of the mortgages created by the joint power, and the further portions appointed by A.'s will.

**HELD**—(1) that A.'s power to raise portions related to the estate of the donee in the land in gross, and was therefore capable of being released in 1854; (2) that it was a power "belonging or annexed or exercisable in respect of" a precedent estate, and was not released by A.'s concurrence in the disentailing deed; (3) that A.'s covenants for title in the mortgages did not amount to a release by him of his power, and therefore the portions appointed by the will had priority over the mortgages.

*Scraper v. Offley* ((1736) 1 Bro. Parl. Cas. 276) distinguished.

*NOTTIDGE v. DERING*; *RABAN v. DERING*, [1909] 2 Ch. 647; 101 L. T. 491—Neville, J.

**(d) Validity.**

**9. Rule Against Double Possibilities—Application of Rule to Equitable Interests.**—The rule against the limitation of land to an unborn child for life with remainder to the latter's unborn child applies alike to legal remainders and equitable interests.

Decision of *Eve, J.* ([1909] 2 Ch. 450; 78 L. J. Ch. 657; 101 L. T. 153; 25 T. L. R. 688; 53 Sol. Jo. 651) affirmed.

*IN RE NASH, COOK v. FREDERICK*, [1909] W. N. [209; 26 T. L. R. 57; 54 Sol. Jo. 48—C. A.

**(e) In General.**

**10. Surrender of Life Interest in Securities—Hotchpot Clause—Valuation as at Date of Appointment or Date of Death of Life Tenant.**—Under a power of appointment contained in a marriage settlement securities were at different times appointed by the life tenant to persons objects of the power, and her interest in the securities was in each case surrendered by the same deed. The settlement contained a hotchpot clause. The life tenant died, leaving part of the funds unappointed.

**HELD**—that the securities must in each case be brought into account at their value as on the

death of the life tenant, and not as on the date of appointment.

*IN RE KELLY'S SETTLEMENT, GUSTARD v. [BERKELEY]*, [1909] W. N. 203; 101 L. T. 555; 54 Sol. Jo. 12—Warrington, J.

**PRACTICE AND PROCEDURE.**

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*See also* ADMIRALTY; ARBITRATION; BANKRUPTCY; COMPANIES; CONTEMPT AND ATTACHMENT; COUNTY COURTS; COURTS; CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; DISCOVERY; EVIDENCE; EXECUTION; EXECUTORS; HUSBAND AND WIFE; INJUNCTIONS; INTERPLEADER; LIBEL AND SLANDER, Nos. 4, 5, 6; LIMITATION OF ACTIONS; LUNATICS, No. 1; MISREPRESENTATION AND FRAUD, No. 1; PARTNERSHIP; PATENTS, Nos. 8 to 12; PLEADING; RAILWAYS, No. 38; RECEIVERS; SALE OF LAND, No. 10; SOLICITORS; SPECIFIC PERFORMANCE; SHIPPING; TRADE MARKS, Nos. 12, 13, 14; TRUSTS, No. 9.

## I. SERVICE OF WRIT OF SUMMONS.

1. *Service on Company—Registered Office—Service at Unregistered Office—Setting aside Writ—R. S. C., Ord. 9, r. 8—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 116.*—The only way in which a writ can be served on a company is by leaving it at or sending it by post to the registered office of the company. It is not sufficient to serve it at an office which, though an office of the company, is not the registered office of the company.

VIGNES v. STEPHEN SMITH & CO., LD., 53 Sol. [Jo. 716—Eve, J.]

## II. SERVICE OUT OF JURISDICTION.

## (a) Breach of Contract performable within Jurisdiction.

[No paragraphs in this vol. of the Digest.]

## (b) Injunction.

[No paragraphs in this vol. of the Digest.]



## II. Service out of Jurisdiction—Continued.

## (c) Miscellaneous.

2. "Ordinarily Resident Within the Jurisdiction"—*Ambassador's Wife Living at Embassy*—*Ord. 11, r. 1 (c).*—The wife of an ambassador to this country who resides with her husband at the embassy is not "ordinarily resident within the jurisdiction" within the meaning of *Ord. 11, r. 1 (c)*, so as to entitle a plaintiff in proceedings against her after she has left this country to serve notice of the writ upon her out of the jurisdiction.

GHIKIS v. MUNSURUS, 25 T. L. R. 225—Parker, J.

## (d) Necessary or Proper Party.

[No paragraphs in this vol. of the Digest.]

## III. SUMMARY JUDGMENT ON SPECIALLY INDORSED WRIT.

3. *Contract Price Payable by Instalments—Action to Recover Instalment—Debt or Liquidated Demand*—*R. S. C., Ord. 3, r. 6; Ord. 14, r. 1.*—The plaintiffs, who were shipbuilders, agreed to build a ship for the defendants for a certain price to be paid by specified instalments as the building of the ship progressed; and by the agreement, upon payment of the first instalment, the hull and materials were to become the absolute property of the defendants, subject only to the vendors' lien for unpaid purchase-money; and if any instalment remained unpaid for fourteen days the plaintiffs were to be at liberty to suspend the work, or they might complete and sell the ship to satisfy their claim. The defendants did not pay the first instalment when it became due, and the plaintiff brought an action to recover the amount thereof, and applied for judgment under *Ord. 14*.

HELD—that the claim was for a "liquidated demand" within the meaning of *Ord. 3, r. 6*, and that therefore *Ord. 14, r. 1*, applied. Those Orders are not confined to cases where the old action of debt would have been maintainable.

WORKMAN, CLARK & CO., LD. v. LLOYD [BRAZILEÑO, [1908] 1 K. B. 968; 77 L. J. K. B. 953; 99 L. T. 477; 24 T. L. R. 458; 11 Asp. M. C. 126—C. A.]

4. *Leave to Defend—Affidavit Verifying Cause of Action—Knowledge or Belief*—*R. S. C., Ord. 14, r. 1.*—Where the affidavit in support of an application for judgment under *Order 14*, is not made by a person who can swear positively to the facts, but is merely an affidavit made on information and belief, there is no jurisdiction to make an order that the defendants should pay a certain sum into Court as a condition of having leave to defend.

LAGOS v. GRUNWALDT AND ANOTHER, [1909] W. N. 216; 101 L. T. 620; 26 T. L. R. 69—C. A.]

## IV. PARTIES.

See also CROWN PRACTICE, No. 1.

## (a) Attorney-General.

[No paragraphs in this vol. of the Digest.]

## (b) Compromise.

[No paragraphs in this vol. of the Digest.]

## (c) Joinder of Defendants.

5. *Joinder of Different Causes of Action against Two Defendants—Debt—Damages for Neglect of Duty and an Account—No Joint Claim against Two Defendants—Motion to Strike out Claim—Jurisdiction*—*Ord. 16, r. 4.*—The plaintiff was one of two parties in a partnership dissolved by consent, there being a considerable sum due to the plaintiff for capital. The second defendant, as agent, sold the business to the first defendant for a consideration which included, *inter alia*, the payment of the debts and liabilities of the dissolved partnership. In an action claiming payment of the amount due in respect of capital to the plaintiff from the first defendant and damages for negligence and breaches of duty in selling the business and an account against the second defendant, the first defendant moved to strike out the statement of claim unless the plaintiff elected against which defendant he would proceed.

HELD—that the Court could deal with the matter on motion; and that, as the only connection between the two causes of action against the defendants was that the measure of relief granted against one might have to be ascertained by the relief granted against the other, the plaintiff must elect.

SADLER v. GREAT WESTERN Ry. Co. (1896) A. C. 450; 65 L. J. Q. B. 462; 74 L. T. 561; 45 W. R. 11; 12 T. L. R. 394) applied.

GREENWOOD v. GREENWOOD AND ARMITAGE, [100 L. T. 68; 53 Sol. Jo. 61—Eve, J.]

## (d) Joinder of Plaintiffs.

[No paragraphs in this vol. of the Digest.]

## (e) Married Woman.

See PARTITION, Nos. 1, 2.

## (f) Pauper.

6. *Right to Sue in Formâ Pauperis—Married Woman—Annuity Subject to Restraint on Anticipation—Husband not Joining in Affidavit as to Means*—*R. S. C., Ord. 16, r. 22.*—A married woman, whose only income, apart from what she earned in teaching one or two girls, was an annuity of £52 a year, subject to restraint on anticipation, made an affidavit, in which her husband did not join, in which she deposed that she was not worth £25, her wearing apparel and the subject-matter of the action alone excepted.

HELD—that she was not entitled to sue *in formâ pauperis*.

Seemle, the husband of a married woman who seeks to sue *in formâ pauperis* must join in her affidavit as to means.

IN RE ATKIN'S TRUSTS, SMITH v. ATKIN, [1909] 1 Ch. 471; 78 L. J. Ch. 307; 99 L. T. 877; 53 Sol. Jo. 61—Eve, J.]

## (g) Representation.

[No paragraphs in this vol. of the Digest.]

## (h) Substituting Plaintiff.

[No paragraphs in this vol. of the Digest.]

## (i) Third Party Procedure.

[No paragraphs in this vol. of the Digest.]

**V. JOINDER OF CAUSES OF ACTION.**

[No paragraphs in this vol. of the Digest.]

**VI. PAYMENT INTO COURT.***See also* COMPANIES, No. 9; LIBEL AND SLANDER.**(a) Acceptance.**

**7. Action for Injunction and Damages—Payment into Court—Denial of Liability—Acceptance by Plaintiff—Costs—Discretion—R. S. C., Ord. 22, r. 7.**—The defendants deposited on land claimed by the plaintiff quantities of mud, sillage and timber, and as was alleged by the plaintiff, thereby damaged his roads and crops. The defendants in their statement of defence justified the acts complained of on the ground that they were owners of the lands in question, and alternatively alleged that they had done the acts complained of under statutory authority. The plaintiff claimed (*inter alia*) (1) a declaration that the defendants were not entitled to make such deposit upon his lands, (2) an injunction, and (3) damages. The defendants, while denying liability, brought into Court the sum of £5, and said that that sum was enough to satisfy the claim in respect of the matters pleaded. The plaintiff thereupon gave notice that he accepted the sum paid into Court "in satisfaction of the claim in respect of which it was paid in." On an appeal by the defendants from a decision of the Master awarding the plaintiff his costs in the action:—

**HELD**—that Ord. 22, r. 7, could not apply in the case of a claim for a declaration of title to land or for an injunction; that the costs, therefore, were in the discretion of the Court, and as it appeared doubtful whether an injunction could in any event have been granted, the plaintiff should have his costs, except in so far as they had been increased by the claim for an injunction; and that so far as the defendants' costs had been increased by such claim they were to be paid by the plaintiff.

**YOUNG v. BLACK SLUICE COMMISSIONERS**, 73 [J. P. 265—Parker, J.]

**(b) Admitting Liability.**

[No paragraphs in this vol. of the Digest.]

**(c) Denying Liability.**

**8. Particulars as to Causes of Action in Respect of which Money Paid.**—In an action claiming £1,831 15s. 7d. for work and labour done and materials provided, and money paid by the plaintiffs for the defendants' use and for goods sold and delivered, the particulars of which had from time to time been supplied by the plaintiffs to the defendants, the defendants, while denying liability, brought into Court the sum of £111 4s. 7d., and pleaded that the said sum was sufficient to satisfy the plaintiff's claim. The plaintiffs thereupon called upon the defendants to give particulars of the items contained in the accounts from time to time furnished, in respect of which the sum of £111 4s. 7d. was lodged in Court.

**HELD**—that, in the circumstances and con-

sidering the smallness of the items, the defendants were not bound to give such particulars.

**ALLIANCE GAS CO. v. DUBLIN CORPORATION**, [43 I. L. T. 22—Div. Ct., Ireland.]

**(d) Generally.**

[No paragraphs in this vol. of the Digest.]

**(e) Libel Action.**

[No paragraphs in this vol. of the Digest.]

**(f) Trustees.**

[No paragraphs in this vol. of the Digest.]

**VII. PAYMENT OUT OF FUND IN COURT.**

*See also* COMPULSORY PURCHASE, Nos. 4, 5, 6, 7, 8; EVIDENCE, No. 9.

**9. Personal Action—Payment into Court—Death of Defendant—Counter-claim by Executors.**—In an action for slander the defendant paid £20 into Court with a denial of liability. The defendant having died, and the plaintiff's claim having therefore abated, the defendant's executors on a counter-claim obtained a verdict for £250.

**HELD**—that the £20 in Court should go in part payment of the £250 and costs obtained by the defendant's executors.

*Brown v. Feeney* ([1906] 1 K. B. 563) followed.

**RAMUS v. DASHWOOD**, *Times*, March 11th, 1909—Grantham, J.

**VIII. ACTION FOR DECLARATION.**

[No paragraphs in this vol. of the Digest.]

**IX. DISCONTINUANCE.**

[No paragraphs in this vol. of the Digest.]

**X. TRIAL.****(a) Miscellaneous.**

**10. Interlocutory Order in Plaintiff's Favour—Appeal Pending by Defendants—Right of Plaintiff to set down Action for Trial.**—A bill of sale, on the strength of which the defendants had taken possession of the plaintiff's goods, was held by the Court of Appeal to be invalid. The defendants entered an appeal to the House of Lords from that order. The plaintiff took out a summons to set down for hearing his action against the defendants, claiming damages for alleged trespass in taking possession of the goods. Eve, J., refused to make an order on the summons until the decision of the House of Lords was given, on the ground that the order would embarrass the defendants in their defence.

**HELD**—that the fact that the plaintiff had obtained an order in his favour did not debar him from setting down his action for trial before the defendants' appeal was heard and determined in the House of Lords.

Decision of Eve, J., reversed.

**GADD v. PROVINCIAL UNION BANK** (No. 2), 53 [Sol. Jo. 615—C. A.]

X. Trial—*Continued.*

## (b) Notice of Trial.

[No paragraphs in this vol. of the Digest.]

## (c) Place of Trial.

[No paragraphs in this vol. of the Digest.]

## (d) Right to Jury.

11. *R. S. C., Ord. 14; Ord. 36, r. 6; Ord. 54, r. 32.*—Upon an application under Ord. 14 for leave to enter final judgment, the Master made the following order:—"It is ordered that the defendant be at liberty to defend this action, and that the action be set down in the short cause list for trial." The defendant then applied for an order that the action be tried with a jury.

HELD—that as the order giving leave to defend imposed no conditions as to the mode of trial, the defendant was entitled under Ord. 36, r. 6, to have the action tried with a jury.

MACARTNEY *v.* MACARTNEY, 25 T. L. R. 818—[Pickford, J.]

12. *Legitimacy Declaration Suit—Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85, ss. 28, 36—Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 4.*—The operation of sect. 28 of the Matrimonial Causes Act, 1857, is confined to issues relating to allegations of adultery in divorce proceedings, and has no application to proceedings under the Legitimacy Declaration Act, 1858. In proceedings under the latter Act the Court has a discretion as to allowing the issues to be tried before a jury.

Circumstances in which, on the ground of inconvenience, delay, and the possible miscarriage of justice, the Court refused to direct the trial by a jury of the issues raised by a petition under the Legitimacy Declaration Act, 1858.

SACKVILLE-WEST *v.* ATTORNEY-GENERAL [LORD SACKVILLE AND OTHERS CITED], [1909] 220; 26 T. L. R. 33—Bigham, Pres.

## XI. MOTION FOR NEW TRIAL.

## (a) Costs.

[No paragraphs in this vol. of the Digest.]

## (b) Grounds for Ordering New Trial.

13. *Misdirection—Single Sentence Separated from Context.*—In considering the question of misdirection a single sentence of the judge's charge to a jury must not be separated from its context unless such sentence dominates the reasoning upon which that portion of the charge is founded. Misdirection to be a ground of new trial must be substantial misdirection.

BLUE AND DESCHAMPS *v.* RED MOUNTAIN RY. [Co., [1909] A. C. 361; 78 L. J. P. C. 107—P. C.]

14. *Damages for Personal Injuries—Misdirection—"Substantial Wrong or Miscarriage"—R. S. C., Ord. 39, r. 6.*—In an action for damages for personal injuries caused by the negligence of the defendant the judge misdirected the jury by leaving it open to them to treat the injury to the plaintiff's sight and hearing as

being permanent, there being no evidence of any such permanent injury proper to be left to the jury.

The plaintiff had admittedly been seriously injured and was for a considerable time in a hospital. The jury gave a verdict for £250 damages.

HELD (Vaughan Williams, L.J., dissenting)—that, the amount of damages being reasonable and proper in respect of the injuries which the plaintiff had admittedly suffered, "no substantial wrong or miscarriage" was occasioned by the misdirection within the meaning of Ord. 39, r. 6, and a new trial ought not to be granted.

*Bray v. Ford* ([1906] A. C. 44; 65 L. J. Q. B. 243; 73 L. T. 609—H. L.) distinguished.

FLOYD AND ANOTHER *v.* GIBSON, 100 L. T. 761 [—C. A.]

## (c) Time for Serving Notice.

15. *Practice—Appeal—Time for Appealing—Motion for a New Trial—Trial by Judge and Jury—Appeal against Decision of Judge—Extension of Time—Appeal not Entered Owing to Illness of Counsel Instructed to Draw Notice of Appeal—R. S. C., Ords. 39, r. 1A, 4; 58, r. 15; 64, r. 7.*—Owing to the illness of counsel instructed to draw notice of motion for a new trial in an action tried with a jury in the King's Bench Division of the High Court, the notice was not served within eight days, as prescribed by R. S. C., Ord. 39, r. 1A, 4. An application to extend the time for serving notice of motion for new trial was adjourned to be heard before the full Court of Appeal.

HELD—that the discretion of the Court as to extension of time for appeal should not be fettered by any strict definition, but should always be exercised for the purpose of doing justice; that the case came within Ord. 64, r. 7, and not under Ord. 58, r. 15; and that leave should be granted upon the terms that the applicants paid the respondents' costs of application in any event.

*Baker v. Faber* ([1908] W. N. 9) followed

RUMBOLD *v.* LONDON COUNTY COUNCIL AND [SCOTT, 100 L. T. 259; 53 Sol. Jo. 227—C. A.]

## XII. ENTRY OF JUDGMENT.

[No paragraphs in this vol. of the Digest.]

## XIII. EXECUTION.

See also JUDGMENT, No. 1.

## (a) Discovery in Aid.

16. *Conduct Money—Expenses in Addition.*—An order made for the attendance in Court of a judgment debtor to be examined as to means directed that she should be tendered a suitable sum "as and for her viaticum." She accepted the sum tendered, and attended for examination, whereupon the judge ordered the plaintiff to pay to the judgment debtor the sum of one guinea "as and for her expenses in attending for examination."



### XIII. Execution—Continued.

**HELD**—that where the judge had jurisdiction to give a certain sum of money as “conduct money,” the Court of Appeal ought not to look into the amount. Whether the judge called the amount ordered to be paid to a judgment debtor under this jurisdiction “conduct money” or “expenses” made no difference.

*Rendell v. Grundy* ([1895] 1 Q. B. 16; 64 L. J. Q. B. 135; 71 L. T. 564—C. A.) considered.  
**EQUITABLE LOAN INVESTMENT SOCIETY v.**  
 [BOLGER, 43 L. L. T. 267—C. A., Ireland.

#### (b) Scotch Judgment.

[No paragraphs in this vol. of the Digest.]

#### (c) Sequestration.

[No paragraphs in this vol. of the Digest.]

#### (d) Stay.

*See COMPANIES*, No. 40.

#### (e) Writ of Possession.

[No paragraphs in this vol. of the Digest.]

#### (f) In General.

[No paragraphs in this vol. of the Digest.]

### XIV. ATTACHMENT OF DEBTS.

**17. Garnishee Order nisi—Army Pension—Paymaster-General's Pay Warrant—Negotiability—Army Act, 1881 (44 & 45 Vict. c. 58), s. 141.]**—The defendant, a retired army officer, entitled to a pension, employed his bank to collect and place the pension to an account which he kept exclusively for such moneys. On January 1st, 1909, there was a sum standing to the credit of this account of £6 13s. 8d.—the balance remaining of previous pension moneys. On that day a garnishee order *nisi* was served on his bankers by the plaintiffs. On the same date the defendant received the usual form of receipt to be signed by him for the amount of his pension then due. This was signed by the defendant and handed to his bankers who credited him with the amount on the same date, although, the money was not actually received till January 7th.

**HELD**—(1) that the sum of £6 13s. 8d. had lost its character as pension and was attached by the garnishee order; (2) that the form signed by the defendant and presented through his bankers to the Paymaster-General was a mere receipt and was not negotiable; and (3) that the garnishee order did not attach the £17 12s. 6d., inasmuch as it had not come into the possession of the defendant till after the date of the garnishee order.

**JONES & Co. v. COVENTRY**, [1909] 2 K. B. 1029; [101 L. T. 281; 25 T. L. R. 736; 53 Sol. Jo. 734—Div. Ct.

### XV. CHARGING ORDERS.

**18. Judgment Debt Payable by Instalments—Default in Payment of Instalments—Jurisdiction to Grant Charging Order—Ord. 42, r. 24—Execution Act, 1844 (7 & 8 Vict. c. 96), s. 61—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5—**

**Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 103.]**—An order was made under sect. 5 of the Debtors Act, 1869, by the judge of the High Court exercising jurisdiction in bankruptcy, for payment of a judgment debt by instalments. The instalments having fallen into arrear, the plaintiff applied to a judge at chambers for a charging order on certain money in Court belonging to the judgment debtor.

**HELD**—that the judge had power, under Ord. 42, r. 24, to direct a charging order, which was a form of execution, to issue in respect of the amount of the instalments in arrear.

*Semble*, the judge at chambers had power under sect. 61 of the Execution Act, 1844, to order execution to issue for the whole unpaid amount of the judgment debt.

**WOODHAM SMITH v. EDWARDS, HASLAM & [Co., GARNISHEES, [1908] 2 K. B. 899; 77 L. J. K. B. 1056; 99 L. T. 710; 24 T. L. R. 864; 52 Sol. Jo. 680; 15 Manson, 322—C. A.**

### XVI. EQUITABLE EXECUTION.

*See HUSBAND AND WIFE*, No. 52; *RECEIVERS*, No. 1.

### XVII. ACTIONS BY AND AGAINST FIRMS.

[No paragraphs in this vol. of the Digest.]

### XVIII. TRANSFER AND CONSOLIDATION OF ACTIONS.

*See also CROWN PRACTICE*, No. 1.

**19. Consolidation without Consent of all Parties—Different Issues to be Tried—R. S. C., Ord. 44, r. 8.]**—Rule 8 of Ord. 44 does not authorise actions commenced by the same plaintiff against different defendants, and pending in the same division, to be consolidated at the instance of the plaintiff without the consent of all parties, unless the issues to be tried are precisely similar.

*Corporation of Saltash v. Jackman* (1 D. & L. 851) applied.

*Martin v. Martin & Co.* ([1897] 1 Q. B. 429; 66 L. J. Q. B. 241; 76 L. T. 44; 45 W. R. 260—C. A.) distinguished.

Decision of Bigham, J. reversed.

**LEE v. ARTHUR**, 100 L. T. 61—C. A.

### XIX. MOTIONS.

[No paragraphs in this vol. of the Digest.]

### XX. ORIGINATING SUMMONS.

[No paragraphs in this vol. of the Digest.]

### XXI. CHAMBERS IN CHANCERY DIVISION.

**20. Appeal from Order in Chambers in District Registry—R. S. C., Ord. 35, r. 12.]**—On an appeal from an Order in chambers in a district registry in the Chancery Division, the procedure is not by motion in Court; the proper practice is an application to the registrar, who should then adjourn the summons to the judge in chambers, when, if necessary, it may be adjourned into Court.

**ATKINSON v. BUTTON**, [1909] W. N. 74—Eady, J.

## XXII. APPEALS.

## (a) Appeals to Court of Appeal.

[No paragraphs in this vol. of the Digest.]

## (b) Appeals to House of Lords.

[No paragraphs in this vol. of the Digest.]

## (bb) Appeals to Privy Council.

21. *Special Leave to Appeal—Royal Prerogative—Judgment “Final and Conclusive”*—*New Zealand Act No. 43 of 1894, s. 93.*—By sect. 93 of the New Zealand Act, No. 43 of 1894, a Native Appellate Court was established to deal with legal rights in matters of land, succession, and probate. Its decisions were to be “final and conclusive.”

HELD—that as an appeal would have lain in such matters had the Court in question not been established, and as the Act did not by express words take away the Royal prerogative, leave to appeal could be given.

IN RE WI MATUA, [1908] A. C. 448; 78 L. J. [P. C. 17; 99 L. T. 752—P. C.]

## (c) Arbitration Appeals.

[No paragraphs in this vol. of the Digest.]

## (d) Divisional Court.

[No paragraphs in this vol. of the Digest.]

## (e) Final and Interlocutory Orders.

22. *Order on Summons Made in Partition Action—Interlocutory or Final—Time for Appealing*—*R. S. C., Ord. 58, r. 15.*—By the judgment in a partition action which was made in default of defence on December 4th, 1906, the usual accounts and inquiries were directed, and certain liberty to apply for a sale was given. It was further ordered that a partition should be made of such of the property as to which a sale should not be applied for and granted, and the further consideration of the action was adjourned. On June 27th, 1907, the Master made his certificate, and on July 6th, 1907, the plaintiffs in the action took out a summons for the partition of the property remaining unsold. At the request of A., who opposed the application, the summons was adjourned to the judge and came on for hearing with the further consideration of the action. The judge made an order on the further consideration, which merely directed payment of the costs of the action and an order for the partition in accordance with the terms of the summons. A. appealed against the latter order, his notice of appeal being served nearly three months after the order was made.

HELD—that the order appealed from was only an order for working out the rights of the parties and was therefore interlocutory and not final, and that consequently under Ord. 58, r. 15, the appeal was out of time.

NORTON v. NORTON, 99 L. T. 709—C. A.

## (f) Miscellaneous.

23. *Order by Vacation Judge—Motion to Discharge Attachment Order*—*R. S. C., Ord. 63,*

*r. 12.*—A Court of first instance cannot discharge an order made by a vacation judge; but it will in certain circumstances direct that no proceedings be taken under the order except with the sanction of that judge or of the Court of Appeal.

HIPKISS v. FELLOWS, 101 L. T. 516—Joyce, J.

## (g) Official Referee.

[No paragraphs in this vol. of the Digest.]

## (h) Security for Costs.

See COMPANIES, No. 43.

## (i) Time for Appeal.

See also No. 15, *supra*; TIME, No. 3.

24. *Extension of Time—Jurisdiction*—*R. S. C., Ord. 39, r. 4; Ord. 64, r. 7.*—A judge in chambers has no jurisdiction under Ord. 64, r. 7, to enlarge the time for appealing to the Court of Appeal. Such applications must be made to the Court of Appeal.

KARNO v. SPRATT, [1909] W. N. 251—C. A.

## XXIII. COSTS.

See also No. 7, *supra*; HUSBAND AND WIFE, Nos. 16, 17, 18, 58; MORTGAGE, No. 11; PARTITION, No. 3; SOLICITORS, V.

## (a) Appeal.

[No paragraphs in this vol. of the Digest.]

## (b) Apportionment.

[No paragraphs in this vol. of the Digest.]

## (c) Discretion of Judge.

25. *Party Recovering One Farthing Damages—Depriving Party of Costs.*—The plaintiff claimed damages from the defendant in respect of an alleged libel and slander. The defendant counter-claimed in respect of statements made about him by the plaintiff. At the trial of the action the jury found for the plaintiff on the claim with one farthing damages and for the defendant on the counter-claim with 48s. damages.

HELD—that the plaintiff should be deprived of his costs, and that the defendant was entitled to the costs of his counter-claim.

NICOLAS v. ATKINSON, 25 T. L. R. 568—Phillimore, J.

26. *Appeal—R. S. C., Ord. 65, r. 1—Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49.*—Where costs are in the discretion of the judge, the Court of Appeal will assume that he has exercised his discretion unless it is satisfied that he has not in fact exercised his discretion, but has applied some rule which excluded the exercise of his discretion.

Bew v. Bew ([1899] 2 Ch. 467) followed.

The dicta in *King v. Gillard* ([1905] 2 Ch. 7) dissented from.

ROTCH v. CROSBIE, 54 Sol. Jo. 30—C. A.

## XXIII. Costs.—(Continued.)

## (d) Documents.

[No paragraphs in this vol. of the Digest.]

## (e) Independent Proceedings.

[No paragraphs in this vol. of the Digest.]

## (f) Miscellaneous.

27. *Witness's Expenses—Plaintiff Necessary Witness—Travelling Expenses from Abroad Incurred Before Action Brought—Address on Writ—Return Fare.*—A plaintiff came from abroad to institute proceedings, on the hearing of which she was examined as a witness, and was allowed the costs of the trial. The taxing master allowed her travelling expenses from abroad and also her return fare.

HELD—that the taxing master was right in allowing the fare from abroad, and that the plaintiff would be entitled to her return fare if she in fact returned.

*Semble*, the statement in a writ of a plaintiff's residence does not operate as an estoppel.

WILTSHIRE v. NEYLON. 43 L. L. T. 167 — [Barton, J., Ireland.]

28. *Action which might have been brought in the County Court—Amount Recovered—Fidelity Bond—R. S. C. (I), Ord. 65, r. 65 (41), (42).*—“Amount recovered” in an action means “amount effectively recovered” or the amount the plaintiff is entitled to get, and in an action on a bond under 9 Will. 3, c. 10, it is not the amount judgment can be entered for, but is the amount for which execution can lawfully issue—namely, the damages assessed by the jury in respect of the breaches.

NICHOLLS v. CORR, [1909] 2 I. R. 655, 670; [43 L. L. T. 198, 201—C. A., Ireland.]

## (g) Security for Costs.

29. *Trustees of Deed of Separation.*—The trustees of a deed of separation suing to enforce a covenant in the deed cannot be ordered to give security for costs.

WHITE v. BUTT, [1909] 1 K. B. 50; 78 L. J. [K. B. 65; 99 L. T. 823; 25 T. L. R. 25; 53 Sol. Jo. 12—C. A.]

## (h) Taxation generally.

30. *Counsel's Fee for Settling Notice of Appeal—R. S. C., Ord. 65, r. 27 (15).*—A fee to counsel for settling a notice of appeal will be allowed on taxation, even though the notice is in common form.

IN RE BAILEY, BAILEY v. BAILEY, [1909] [W. N. 110; 53 Sol. Jo. 522—Eve, J.]

## (i) Trustees and Executors.

[No paragraphs in this vol. of the Digest.]

## (k) Two Defendants.

31. *Successful and Unsuccessful Defendants—Liability inter se.*—In an action of damages for personal injury brought against two defendants, each maintained that the injury was due to the fault of the other.

HELD—that the unsuccessful defender was liable in expenses to the successful defender as well as to the pursuer.

CRAIG v. ABERDEEN HARBOUR COMMISSIONERS, [1909] S. C. 736; 46 Sc. L. R. 508 —Ct. of Sess.

## XXIV. STAY OF PROCEEDINGS.

## (a) Actions in Different Courts.

32. *Agreement to Refer Disputes to Foreign Court.*—An agreement to refer disputes to a foreign tribunal entitles a defendant to a stay of proceedings in this country unless a case is made out for an injunction.

KIRCHNER & CO. v. GRUBAN, [1909] 1 Ch. [413; 78 L. J. Ch. 117; 99 L. T. 932; 53 Sol. Jo. 151—Eve, J.]

## (b) Frivolous and Vexatious Actions.

[No paragraphs in this vol. of the Digest.]

## (c) Miscellaneous.

[No paragraphs in this vol. of the Digest.]

## XXV. MISCELLANEOUS.

33. “*Preservation or Inspection of Property—Ship—Constructive Total Loss—Application by Underwriters for Order that Ship should be Brought to England for Inspection and Repair—R. S. C., Ord. 50, r. 3.*”—In an action on a policy the plaintiffs claimed for a constructive total loss of the ship. While on a voyage covered by the policy the ship had struck a reef, but had been got off and towed into dock at Singapore, where she still was. The defendants, who were underwriters, moved for an order under Ord. 50, r. 3, that the ship should be temporarily repaired at their expense, and at their risk be brought back to England before the date of the trial. Bray, J., at chambers, thought that he had no jurisdiction, and dismissed the application.

HELD—that there was jurisdiction under Ord. 50, r. 3, either on the ground of “preservation” or “inspection,” but as the defendants must be placed under terms, the matter must go back to the learned judge to decide the terms on which the order should be granted.

Chaplin v. Puttick ([1898] 2 Q. B. 160; 67 L. J. Q. B. 516; 78 L. T. 410; 14 T. L. R. 365; 46 W. R. 481) followed.

Decision of Bray, J. reversed.

STEAMSHIP “NEW ORLEANS” CO., LD. v. [LONDON PROVINCIAL MARINE AND GENERAL INSURANCE CO., LD., [1909] 1 K. B. 943; 78 L. J. K. B. 473; 100 L. T. 595; 53 Sol. Jo. 286; 14 Com. Cas. 111; 11 Asp. M. C. 225—C. A.]

## PRESCRIPTION.

See EASEMENTS; HIGHWAYS; MINES AND MINERALS; REAL PROPERTY AND CHATTELS REAL; WATERS AND WATERCOURSES.



**PRESS AND PRINTING.**

*See also* LABEL, Nos. 7, 8, 9.

1. *Newspaper and Contributor—Indemnity—Joint Tortfeasors—Indemnity to Printers against Libel Actions.*—The plaintiffs published a newspaper for defendants, who agreed to indemnify them against claims in respect of any libellous matter.

An action for libel was brought against both plaintiffs and defendants.

**HELD**—that the plaintiffs (who paid money to compromise the libel action) could not recover on the indemnity against the defendants, an agreement by one of two joint tortfeasors to indemnify the other in respect of a wrongful act committed by both not being enforceable.

SMITH (W. H.) & SON *v.* CLINTON, 99 L. T. [810; 25 T. L. R. 31—Lord Coleridge, J.

2. *Libel—Publication of Extract from Blue-book by Newspaper—Privilege.*—A newspaper publishing an extract from a Blue-book which is defamatory is protected on the ground of privilege if they plead sect. 3 of the Parliamentary Papers Act, 1840, and prove that the publication of the extract was made *bonâ fide* and without malice. Sect. 3 of that Act applies to such a case.

*Houghton v. Plimsoll* (Times Newspaper, April 2nd, 1874—Amphlett, B.) followed.

MANGENA *v.* WRIGHT, [1909] 2 K. B. 958; 78 [L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534; 53 Sol. Jo. 485—Phillimore, J.

3. *Libel—Newspaper—Privilege—Register of Receiverships.*—The publication in a newspaper of a copy of an entry as to the appointment of a receiver of a company contained in the register kept by the Registrar of Joint Stock Companies, pursuant to the Companies Acts, and which by law the public are entitled to inspect, is privileged.

*Searles v. Searlett* ([1892] 2 Q. B. 56—C. A.) applied.

JOHN JONES & SONS, LD. *v.* THE "FINANCIAL [TIMES]" LD., 25 T. L. R. 677; 53 Sol. Jo. 614—C. A.

**PRESTON COURT OF PLEAS.**

*See* COURTS.

**PRESUMPTION AS TO DOCUMENTS AND FACTS.**

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**PREVENTION OF CRIME.**

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**PREVENTION OF CRUELTY TO CHILDREN.**

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**PRINCIPAL AND AGENT.**

*See* AGENCY.

**PRINCIPALS AND ACCESSORIES.**

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**PRINCIPAL AND SURETY.**

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**PRIVATE INTERNATIONAL LAW.**

*See* CONFLICT OF LAWS.

**PRIVATE STREET WORKS.**

*See* HIGHWAYS; METROPOLIS.

**PRIVATE WAYS.**

*See* EASEMENTS.

**PRIVILEGE.**

*See* DISCOVERY; EVIDENCE; LIBEL  
AND SLANDER.

**PRIVY COUNCIL.**

*See* COURTS; DEPENDENCIES AND  
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**PRIZE FIGHTING.**

*See* CRIMINAL LAW AND PROCEDURE.

**PROBATE DUTY.**

*See* DEATH DUTIES.

**PROBATE OF WILLS.**

*See* EXECUTORS AND ADMINISTRATORS.

**PROCESS.**

*See* PRACTICE AND PROCEDURE.

**PROFITS À PRENDRE.**

*See* EASEMENTS AND PROFITS À  
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**PROMISSORY NOTE.**

*See* BILLS OF EXCHANGE AND PRO-  
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**PROPERTY TAX.**

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**PROVIDENT SOCIETIES.**

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**PUBLIC AUTHORITIES  
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**I. THE PUBLIC AUTHORITIES PROTEC-  
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(a) Application of Act.

[No paragraphs in this vol. of the Digest.]

(b) Costs as Between Solicitor and Client.

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(c) Limitation of Actions.

1. "Continuance of Injury or Damage"—  
*Pollution of Stream—Public Authorities Protec-  
tion Act, 1893 (56 & 57 Vict. c. 61), s. 1.*—The  
plaintiff claimed damages from the defendants  
on the ground that an effluent from sewage  
works belonging to them flowed into a stream  
and polluted it, with the result that three of the  
plaintiff's cows died. The three cows died in  
November, 1906, July, 1907, and September,  
1907, respectively. The plaintiff commenced his  
action on April 22nd, 1908. It was proved or  
admitted that the pollution of the stream con-  
tinued down to the time when the action was  
commenced. Defendants contended that the  
death of each cow was a distinct cause of action,  
and that as the plaintiff had not commenced his  
action till more than six months had elapsed  
from the death of each cow, the defendants were  
protected by sect. 1 of the Public Authorities  
Protection Act, 1893.

**HELD**—that as the act of the defendants in  
respect of which the plaintiff sued was the  
pollution of the stream, which continued down

### I. The Public Authorities Protection Act, 1893— *Continued.*

to the time when the action was commenced, the defendants were not protected by the Public Authorities Protection Act, 1893.

HAGUE *v.* DONCASTER RURAL DISTRICT COUN-  
[CIL, 100 L. T. 121; 73 J. P. 69; 25 T. L. R.  
130; 53 Sol. Jo. 135; 7 L. G. R. 129—Div. Ct.]

### II. ACTS OF STATE.

[No paragraphs in this vol. of the Digest.]

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## PUBLIC HEALTH.

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DRUGS; HIGHWAYS; INJUNCTIONS;  
LANDLORD AND TENANT; LOCAL  
GOVERNMENT; METROPOLIS; NUIS-  
ANCE; PUBLIC AUTHORITIES;  
RATES AND RATING; SEWERS AND  
DRAINS; STREET TRAFFIC;  
WATERS.

### I. HOUSING.

(a) Common Lodging House.

[No paragraphs in this vol. of the Digest.]

(b) Housing of Working Classes.

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### II. MILK, MEAT, AND WATER SUPPLY.

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### III. VACCINATION.

[No paragraphs in this vol. of the Digest.]

### IV. HOSPITALS AND INFECTIOUS DISEASES.

*See also* NEGLIGENCE, No. 10.

1. *Injury to Patient through Negligence in Operation — Liability of Governors.* — The governing body of a hospital do not undertake to perform operations themselves, but to supply a medical staff consisting of persons in whose selection they have taken due care. Though some members of this medical staff, such as nurses and carriers, are for some purposes the servants of the corporation, yet during the operation they take their orders from the surgeons and cannot be considered servants of the corporation. The corporation therefore is under no liability to a patient in respect of injuries incurred by reason of the negligent performance of an operation.

Decision of Div. Ct. (25 T. L. R. 468) affirmed.

HILLYER *v.* GOVERNORS OF ST. BARTHOLOMEW'S  
[HOSPITAL, [1909] 2 K. B. 820; 78 L. J. K. B.  
958; 101 L. T. 368; 25 T. L. R. 762; 53 Sol.  
Jo. 714; *sub nom.* HILLYER *v.* LONDON  
CORPORATION, 73 J. P. 501—C. A.]

### V. NUISANCE: ABATEMENT AND EXPENSES.

[No paragraphs in this vol. of the Digest.]

### VI. EARTH AND WATER CLOSETS.

2. *Substitution of Water-closets for Privies—Notice—Sufficiency—Power of Justices—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 36, 305.*—The appellant was the owner of certain houses furnished with privy middens, but not water-closets. The respondents resolved that a notice should be served on the appellant requiring her to provide water-closets and ashpits. In pursuance of such resolution the following notice was served upon the appellant under sect. 36 of the Public Health Act, 1875: "Take notice that the (respondents) being satisfied on the report of their inspector of nuisances . . . that the houses . . . are without sufficient water-closets, ashpits, and ashbins, hereby require you in pursuance of the provisions of the Public Health Act, 1875, to provide for the houses within the space of thirty-one days from



**VI. Earth and Water closets—Continued.**

the service upon you of this notice sufficient water-closets, ashpits, and ashbins."

**HELD**, that the notice was sufficient compliance with sect. 36 of the Public Health Act, 1875, even although it did not allege that the houses were without sufficient earth-closets or privies as well as water-closets.

When once it is shown on the report of the surveyor that the existing appliance is to be done away with and that a new appliance is to be substituted, it is only necessary to give sufficient notice to the person on whom such notice is to be served, as to the work which he has to do.

On an application to justices for an order under sect. 305 of the Public Health Act, 1875, to enter premises and do work, the justices should see that a proper notice has been served by the local authority.

**SUTCLIFFE v. SOWERBY BRIDGE URBAN DISTRICT COUNCIL**, 100 L. T. 967; 73 J. P. 385; 7 L. G. R. 822—Div. Ct.

**3. Undertaking to Cleanse Privies—Non-approval under Local Act—Reasonable Excuse for Not Cleansing—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 42–44 Derby Improvement Act, 1879 (42 & 43 Vict. c. cccv.), s. 67.]**

—The appellants summoned the respondents, who were a local authority, under sect. 43 of the Public Health Act, 1875, for failing without reasonable excuse to cleanse the privies in the appellants' factory after having undertaken the cleansing of privies in their district. A local Act provided that all privies should be subject to the approval of the local authority, but the privies in question had not been approved by the respondents, as they did not satisfy their requirements. The respondents had themselves undertaken the cleansing of all privies which had received their approval.

**HELD**—that although sect. 42 of the Public Health Act, 1875, authorised a local authority to undertake the cleansing of privies "either for the whole or any part of their district," this did not empower them to undertake the cleansing merely of such privies as had received their approval, that the respondents must be treated as having undertaken the cleansing of all privies in their district, and that the non-approval of the privies in question was not a reasonable excuse for failure to cleanse them.

**PEGG & JONES, LD. v. DERBY CORPORATION**, [1909] 2 K. B. 511; 78 L. J. K. B. 909; 101 L. T. 237; 73 J. P. 413; 7 L. G. R. 922—Div. Ct.

**VII. HOURS OF EMPLOYMENT.**

[No paragraphs in this vol. of the Digest.]

**VIII. SLAUGHTER-HOUSES.**

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**IX. FIRE BRIGADE.**

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See EXPLOSIVES; HIGHWAYS; LOCAL GOVERNMENT; METROPOLIS; PUBLIC HEALTH; STREET TRAFFIC; THEATRES, ETC.

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### I. RAILWAYS.

#### (a) Construction.

##### (i.) Accommodation Works.

**1. Level Crossing—Easement—Alteration of Use in Character and Extent—Increase of Burden and Responsibility of Railway Company—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 68.**—In 1852 a railway company under their statutory powers acquired a strip of land and constructed their line thereon so as to cut off a triangular piece of land bounded by a river and the railway line. The piece of land was at that period used solely for agricultural and grazing purposes, and the company, acting under sect. 68 of the Railways Clauses Consolidation Act, 1845, made a level crossing across their line as an accommodation work to afford access to it. The level crossing was protected by locked gates, and a signalman had charge of the key. When it was desired to drive sheep or cattle to or from this land, the driver obtained the key from the signalman, but this occurred once or twice a week only, and at some seasons not oftener than once or twice a month, and only one crossing and recrossing took place on any one day. In 1904 the land was let to a tennis club with a considerable number of members, who crossed

the railway generally by climbing over the gates, but occasionally lifting them off their hinges. The spot was a dangerous one, as the traffic was considerable. The railway company now asked for a declaration that the owners of the land were not entitled to use, or to permit the use of, the level crossing as an access to the tennis club so as to increase the burden and liability of the company.

**HELD**—that by the user of the crossing by the tennis club the character and extent of the defendant's easement had been substantially altered and the burden on the plaintiff company greatly increased since the construction of the railway; and therefore that the defendants were not entitled to permit such user.

**TAFF VALE RY. CO. v. CANNING.** [1909] 2 Ch. 48; 78 L. J. Ch. 492; 100 L. T. 845—Eady, J.

**2. Easement—Right to Make Tunnel Under Railway—Uncertainty—Perpetuity—Railways Clauses Act, 1845 (8 Vict. c. 20), s. 71.**—By an agreement, made in 1847 between J. H. C. and a railway company, it was provided that if at any time thereafter J. H. C., his heirs, appointees, or assigns should be desirous of making a tunnel or archway under the railway then in contemplation, where it would pass through J. H. C.'s land which the railway company required to purchase, he or they should be at liberty to make the same provided it did not interfere with the railway or impede the traffic and was made under the direction and to the satisfaction of the company's engineer. The defendants, who were lessees of the land and entitled to the benefit of this agreement, now proposed to make a tunnel in accordance with the right reserved. The railway company objected that the provision in the agreement of 1847 as to the making of a tunnel was too uncertain and indefinite and was void in law as tending to a perpetuity, and they claimed an injunction to restrain the making of the tunnel.

**HELD**—that the rule against perpetuities had no application to the case, that the defendants had a legal right or easement to make the tunnel, and that the action to restrain them from making it consequently failed.

Decision of Eady, J. (73 J. P. 482; 25 T. L. R. 811) affirmed.

**SOUTH EASTERN RY. CO. v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS** (1900). Ld., [1909] W. N. 217; 26 T. L. R. 61; 54 Sol. Jo. 80—C. A.

##### (ii.) Parliamentary Deposits.

[No paragraphs in this vol. of the Digest.]

##### (iii.) In General.

**3. Compulsory Powers—Expiration of Time Limited for Exercise of—Land Already Acquired by Company—Common Law Right as Owners to Construct Railway Thereon.**—A railway company were authorised to construct a railway, but a section of the special Act provided that if the railway was not completed within five years, then the powers given by the Act to

### I. Railways—Continued.

the company for making and completing the railway were to cease.

HELD—that this proviso applied only to powers which the company could only exercise by virtue of the Act, and that if the company before the end of the five years had lawfully acquired the right to use the necessary land, and were incorporated for the purpose of making the railway, they could do so even after the expiration of the five years under their common law powers.

Decision of C. A. ([1908] 2 Ch. 644; 77 L. J. Ch. 820; 99 L. T. 676; 13 Rly. Cas. 347) affirmed.

MIDLAND RY. CO. v. GREAT WESTERN RY. CO., [1909] A. C. 445; 78 L. J. Ch. 686; 101 L. T. 142; 53 Sol. Jo. 671—H. L.

4. *Extension—Special Act—Separate Undertaking—Liability for Cost of Construction.*—A railway company were authorised by a special Act to construct an extension of their system of railways. The Act provided that the extension should be a "separate undertaking," with "separate share or stock and loan capital," and that, "as between the general undertaking of the company and the separate undertaking, the expenses of maintaining and working the separate undertaking shall be borne and paid out of the revenue of the separate undertaking." It was also provided that the company should keep separate and distinct registers of the proprietors of the extension, and separate and distinct accounts of the receipts, payments, and liabilities of the extension.

HELD (Lord Ashbourne dissenting)—that the general assets of the company, and not only the property of the separate undertaking as constituted by the special Act, were liable for the costs of the construction of the extension.

Judgment of the C. A. in Ireland reversed.

S. PEARSON & SON v. DUBLIN AND SOUTH [EASTERN RY. CO., [1909] A. C. 217; 78 L. J. P. C. 91; 100 L. T. 499; 25 T. L. R. 360; 43 I. L. T. 104—H. L.

5. *Tramroad—Land Used as a Railway—Partial Exemption from General District Rate—Public Health Act, 1875* [38 & 39 Vict. c. 55], s. 211, sub-s. 1 (b).—The word "railway" as used in sect. 211 of the Public Health Act, 1875, is not confined to any particular kind of railway. The question to be determined is, "What is the thing according to common understanding? How would it be described in ordinary parlance?"

THORNTON URBAN DISTRICT COUNCIL v. [BLACKPOOL AND FLEETWOOD TRAMROAD CO., [1909] A. C. 264; 78 L. J. K. B. 517; 100 L. T. 657; 73 J. P. 299; 25 T. L. R. 481; 53 Sol. Jo. 445; 7 L. G. R. 687—H. L.

See S. C. under RATES AND RATING (No. 3).

#### (b) Working and Management.

##### (i.) In General.

6. *Private Siding—Reasonable Facility—Serious Inconvenience—Private Siding not in*

*Existence—Railways (Private Sidings) Act, 1904* (4 Edw. 7, c. 19), s. 2.—An application for an order compelling a railway company, under sect. 2 of the Railways (Private Sidings) Act, 1904, to allow the connection of a proposed private siding with the company's line was refused on the ground that the proposed siding connection would cause serious additional inconvenience to the traffic, which was already worked with difficulty at the point where the connection was proposed to be made, and that therefore the connection of the siding was not a "reasonable" facility.

*Quere*, whether sect. 2 of the Act applies to a private siding not yet in existence.

JOHN GREENWOOD & SONS, LD. v. CHESHIRE [LINES COMMITTEE—13 Rly. Cas. 169—Rly. & Can. Com.

7. *Through Traffic—Exchange Points between Two Companies—Order to Receive Traffic—Company Applying not Actually Owner of Line at Junction—No Exchange Sidings—Running by Consent over Part of Defendants' Line—Consent Withdrawn.*—Although every railway company is *prima facie* bound to receive, forward and deliver traffic duly tendered at any junction on the railway, it does not follow that in the case of every junction an order to do so should be made upon an unwilling railway company. The question of facilities and reasonableness under all the circumstances must be considered. The G. C. railway and the L. and Y. railway were connected at four different exchange points. Of these the junction at A. provided the shortest route for certain through traffic. The communication at A. between the railways was a short length of line belonging to the M. railway company, over which the G. C. company had running powers. At A. itself there were no exchange sidings, but the G. C. company had been running its trains by the consent of the L. and Y. company, over a portion of the latter's line to a spot where there were exchange sidings. The L. and Y. company withdrew this consent. The G. C. company now applied for an order directing the L. and Y. company to receive their traffic at all the exchange points.

HELD—that, with regard to the junction at A. the G. C. company were not prevented from relying on a certain section of the L. and Y. Railway Act by the fact that the junction was actually one between the M. company and the L. and Y. company; but that it would be unreasonable to order the L. and Y. company to receive the traffic upon their running line at A. where there were no exchange sidings, and that there was no power to compel them to put in exchange sidings; and that the order to receive traffic must be made in respect of the exchange points other than A., but refused as to A.

GREAT CENTRAL RY. CO. v. LANCASHIRE AND [YORKSHIRE RY. CO., 13 Rly. Cas. 266—Rly. & Can. Com.

##### (ii.) Rates.

8. *Charge for Siding Accommodation—Coal Waggons Remaining on Siding—Services which*



### I. Railways—(Continued).

*Company are Not Compellable to Render—Reasonableness—Question of Fact for Jury—Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cxxix.), s. 4: Sched. Part IV.]—The Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, provides maximum charges for all services rendered by the company within the scope of their undertaking except in a few cases which are expressly excepted; and the fact that the railway company are not compellable to render the services does not allow them freedom of contract as to the charges for those services. The limitation imposed upon the charges in respect of items in Part IV. of the schedule to the Order is that the charges shall be reasonable, and the question of reasonableness is a question for the ordinary tribunals of the country.*

Therefore a charge made by a railway company under Part IV. of the schedule for allowing coal waggons to remain on their wait-order sidings until directions are given by the trader for their disposal must be a reasonable charge, though the company are under no obligation to render the service, and the question of reasonableness is for the ordinary tribunals of the country to determine.

Decision of C. A. C. [1908] 2 K. B. 356; 77 L. J. K. B. 551; 21 T. L. R. 446; 52 Sol. Jo. 377) affirmed.

MIDLAND RY. CO. v. MYERS, ROSE & CO., [1909] A. C. 13; 78 L. J. K. B. 95; 99 L. T. 411; 24 T. L. R. 810—H. L.

**9. Increase—Proof of Reasonableness—Date to be Considered—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1—Particulars—Failure to Give—Admissible Evidence.]—In determining whether an increase of a rate by a railway company since 1892 is reasonable, the point of time to be considered is the time when the increase is made. The reasonableness of the increase must depend upon the circumstances then existing, and the circumstances occurring subsequently are irrelevant considerations.**

NORTH STAFFORDSHIRE COLLIERY OWNERS' [ASSOCIATION v. NORTH STAFFORDSHIRE RY. CO. AND OTHERS, [1908] 1 K. B. 771; 77 L. J. K. B. 448; 99 L. T. 652; 24 T. L. R. 377; 13 Rly. Cas. 78—Rly. and Can. Com.

**10. A railway company in 1895 reduced their rates for coal traffic; in 1900 they returned to the original rates.**

Upon a complaint as to increase of rates the company were ordered to give particulars of any increase of expense in carrying coal upon which they relied as justification. No particulars were given.

HELD—that the company might nevertheless show that the reduction had been granted in consequence of depression in the coal trade, and thus justify a return to the pre-existing rates now that the depression had passed away.

Decision of Railway and Canal Commissioners (*supra*) affirmed.

S. C., [1908] 2 K. B. 765; 77 L. J. K. B. [1021; 99 L. T. 652; 24 T. L. R. 780; 13 Rly. Cas. 78—C. A.

**11. Trucks Provided by Traders—Reduction—Maximum Rate Authorised or Rate in Force—Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cxxii.), Sched. Part II.]—A difference having arisen between the applicants and the railway company under Part II. of the schedule to the Great Western Railway Company's (Rates and Charges) Order Confirmation Act, 1891, as to the amount whereby the authorised rates for conveyance should be reduced in respect of merchandise carried by the railway company in trucks provided by the applicants:**

HELD—that the deduction was to be made from the rate in force as specified and shown by the company's rate-book, and not from the maximum rate which the company might charge for the conveyance of merchandise under their Act.

Decision of Railway and Canal Commissioners affirmed.

SPILLERS AND BAKERS, LD. v. GREAT [WESTERN RY. CO., [1909] 1 K. B. 604; 78 L. J. K. B. 444; 100 L. T. 773; 25 T. L. R. 315; 53 Sol. Jo. 285—C. A.

**12. Traders' Siding—Services Incident to Conveyance—Sorting Trucks—Truck Hire—Rebate—Rates and Charges Order, s. 9.]—Conveyance, properly so-called, by a railway company to the works of a trader who has private sidings does not terminate until the private siding-points are reached, but it does not follow that all use of the railway company's sidings before the private siding-points are reached is part of conveyance. It is a question of fact in each case whether the service rendered by the railway company is incident to conveyance, or is due to request, express or implied, of the trader.**

The applicants' outward traffic was placed in trucks by the applicants' servants upon their own sidings in whatever order the trucks happened to be ready. The trucks were consigned to different destinations lying in different directions. Before the trucks could be attached to the train which should convey them, they had to be removed to sidings of the railway company where they could be sorted ready for conveyance.

HELD—that such sorting of the trucks was not part of the duty of conveyance, but was work done for the applicants at their request made when they tendered trucks mixed up in such an order as to make it impossible to convey them to their several destinations without doing it.

Sect. 9 of the Rates and Charges Order is perfectly general in its terms, and applies whether the journey to be performed is wholly over the line of the particular railway or is partly over that railway and partly over the line of another company.

BIRMINGHAM CORPORATION v. MIDLAND RY. [CO., LONDON AND NORTH-WESTERN RY. CO., AND GREAT WESTERN RY. CO., 26 T. L. R. 46—Rly. and Can. Com.

**13. Through Rates—Railway Amalgamation Act—Running Powers of Third Railway—**

### 1. Railways—Continued.

*Longer Competitive Route.*]—An Act authorising the amalgamation of two Irish railway companies gave certain facilities and running powers over the G. S. railway to a third railway company, the S. E. company, which enabled the latter to provide a longer but competing route from stations on the G. S. railway *via* Dublin to various places in the United Kingdom and also to stations on their own line. An application was made to the Court to determine whether, and what, through rates should be allowed by the G. S. company.

**HELD**—that the S. E. company were entitled to through rates between all stations on the G. S. railway covered by the running powers and all stations, either on the S. E. railway or elsewhere in the United Kingdom, where the S. E. company provided a reasonable route *via* Dublin, and between other stations on the G. S. railway and all stations, either on the S. E. railway or elsewhere in the United Kingdom, where the route provided by the S. E. company did not exceed by more than 50 per cent. the route provided by the G. S. company, and that the rates to stations on the S. E. railway should be equal to the rates for the shortest route between the stations, and the rates to places elsewhere *via* Dublin should be equal to the rates charged by the G. S. company for their own route between the respective stations.

GREAT SOUTHERN AND WESTERN RY. CO. OF [IRELAND *v.* DUBLIN AND SOUTH EASTERN RY. CO., 13 Rly. Cas. 176—Rly. and Can. Com.

**14. Through Rates—Interests of Rival Ports—Statutory Protection—Routes Reasonably Competitive.**]—By an Irish railway amalgamation Act the interests of the port of Dublin were safeguarded against being placed at an undue disadvantage compared with any other port or city. The amalgamated company in connection with the G. W. R. company in England established lower through rates and a better system by a new and shorter route opened by the G. W. R. company than by a previously established route *via* Dublin.

**HELD**—that the port of Dublin had been placed at an undue disadvantage and that equal rates must be imposed where the two routes were reasonably competitive, which would be so where the longer route did not exceed the shorter by more than 50 per cent.

DUBLIN PORT AND DOCKS BOARD *v.* GREAT [SOUTHERN AND WESTERN RY. CO., LONDON AND NORTH WESTERN RY. CO. *v.* SAME, 13 Rly. Cas. 209—Rly. and Can. Com.

**15. Through Rates—Non-Statutory Agreement to Maintain Fares—Application of New Competing Route—Proposed Fares Not Proportionately Lower than other Fares Subject to Competition—Proof of Reasonableness.**]—The D. and S. E. railway, by a non-statutory agreement with the L. and N. W. railway had established through fares between certain places in England and their stations in Ireland and had undertaken not to lower these fares by any

other route. There was at the time of the agreement no competing route. To other stations in Ireland where there were competing routes the L. and N. W. railway charged fares which gave them a profit, but which were lower than those charged to the stations of the D. and S. E. railway. The G. W. railway having opened a competing route, gave notice to the D. and S. E. railway requiring through fares between stations in England and Ireland covered by the above agreement. The D. and S. E. railway refused to comply with the notice.

**HELD**—that the reasonableness of the proposed rates of the G. W. railway was proved by the fact of the L. and N. W. railway charging lower rates in proportion to mileage under competition elsewhere than those proposed, and that the non-statutory agreement could not affect the Court's decision.

GREAT WESTERN RY. CO. *v.* DUBLIN AND [SOUTH EASTERN RY. CO. AND OTHERS, 13 Rly. Cas. 227—Rly. and Can. Com.

**16. Through Rate—Application—Proportion of Longer Through Rate—Existing Local Through Rate—No Undue Preference.**]—No point being raised as to undue preference, the fact that a proportion of a through rate, by sea and land, calculated for the purposes of members of a federation or conference in respect of that part of the route, which is on land, *viz.*, G. to B., is less than the existing local through rate from G. to B., which is not proved to be unreasonable, is not a sufficient ground for an application for a through rate from G. to B. equal to the apportioned part of the longer through rate.

JESCOTT (LEEDS), LD. *v.* LANCASHIRE AND [YORKSHIRE RY. CO. AND GREAT NORTHERN RY. CO., 13 Rly. Cas. 276—Rly. and Can. Com.

**17. Through Rate—Application—"Railway Company"—Practically Treated as Private Siding.**]—A railway company, owning a short length of line and one engine, but no other rolling stock, having been always in the position of a private siding or private branch railway, cannot apply for a through rate on the footing of being a railway company wholly equipped and performing all the functions of an ordinary railway company.

STOCKSBRIDGE RY. CO. *v.* GREAT CENTRAL [RY. CO., 13 Rly. Cas. 335—Rly. and Can. Com.

**18. Undue Preference—Inclusive Charges for Collection and Delivery—Cartage Performed by Trader—Rebate—Basis of Calculation.**]—The applicants, who were carriers and carters, complained as to the insufficiency of rebate allowed by the defendants off rates for the carriage of goods in respect of the applicants performing their own cartage.

**HELD** (Sir James Woodhouse dissenting)—that the applicants had not established any case against the defendants of unduly preferring themselves, or of unduly prejudicing the applicants by reason of the insufficiency of the rebates allowed; by Bigham, J., on the ground that the proper measure of the rebate in such cases was the sum which the trader saved the railway



**I. Railways—Continued.**

company by dispensing with the company's cartage service and doing the cartage service himself, with or without some measure of profit (if any) which the railway company would have earned if they had done the cartage themselves, and that the applicants had not shown that the rebates allowed were less than the sum so estimated; and by Mr. Gathorne-Hardy on the ground that the true measure of rebate was charge and not cost, and that the applicants had not established that the rebate allowed to them was less than the defendants themselves charged and received for the cartage services.

**HELD**, on appeal—that the question was one of fact, and as the Railway Commissioners had not proceeded upon any wrong principle of law, the Court of Appeal could not interfere with the decision of a majority of them.

**PICKFORDS. LD. v. LONDON AND NORTH-WESTERN RY. CO.**, 98 L. T. 170; 23 T. L. R. 535; 24 T. L. R. 149; 13 Rly. Cas. 31—Rly. and Can. Com. and C. A.

**19. Undue Preference—Delivery at Dock and Railway Companies' Exchange Sidings—Charge to Trader within Dock Area Not Made to Foreign Importer—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27 (2).**—A dock company received 1s. 5d. per ton for hauling, loading, etc., goods from warehouse or quay to a railway company's exchange sidings. The applicants, who had flour mills within the dock premises, were charged 1s. per ton by the railway company in respect of the traffic between their mills and the exchange sidings and were allowed by the dock company 8d. per ton for loading, etc. The railway company made no charge for imported grain or flour not ground within the dock area. When, on learning this, the applicants refused to pay the railway company the 1s. per ton, the latter refused to pay the 1s. 5d. per ton to the dock company, who consequently, instead of allowing 8d., charged 9d. per ton to the applicants for haulage of their grain and flour to the exchange sidings.

**HELD**—that the railway company had unduly preferred the foreign grain and flour imported as against the applicants.

**JOSEPH RANK, LD. v. GREAT EASTERN RY. CO.**, 13 Rly. Cas. 131—Rly. and Can. Com.

**20. Under Preference—Competing Traders—Preferred Trader having Works near Other Railway.**—E.'s bricks were carried by the L. and N. W. railway from W. to L. at a higher rate than that charged for F.'s bricks, which were carried from M. to L., a shorter distance. F. had other works near another railway line with a shorter route to L.

**HELD**—that the ability of F. to supply the demand for bricks at L. by bricks manufactured at F.'s other works and carried by the other railway did not justify the preference given to F. at the expense of E.

**EASTWOOD & CO., LD. v. LONDON AND NORTH-WESTERN RY. CO.**, 13 Rly. Cas. 137—Rly. and Can. Com.

**21. Undue Preference—Same Rates Charged for Longer Distance—Competition with Other Places—Interests of the Public—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27, sub-s. 2.**—The words "interests of the public" in sect. 27, sub-sect. 2, of the Railway and Canal Traffic Act, 1888, include the interests of any considerable portion of the population not being the parties or their servants. Traders complained that the same rates for fish by passenger train were charged between London and Milford, and London and Swansea, although Milford was seventy miles further from London than Swansea and on the same company's line. The company replied that the Milford rates were necessitated by competition with other ports. The complaint was dismissed.

**CASTLE STEAM TRAWLERS, LD. v. GREAT WESTERN RY. CO.**, 24 T. L. R. 317; 13 Rly. Cas. 145—Rly. and Can. Com.

**22. Undue Preference—Mode in which Goods Packed—Tomatoes in Crates and in Baskets—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.**—Application for through rates for tomatoes from the Channel Islands and complaint of undue preference dismissed on the ground that the French tomatoes were packed in crates and were therefore more easily handled, and that the company were prepared to grant the same terms to Channel Island growers if they would pack in crates.

**GUERNSEY MUTUAL TRANSPORT CO., LD. AND ANOTHER v. LONDON, BRIGHTON, AND SOUTH COAST RY. CO. AND LONDON AND NORTH-WESTERN RY. CO.**, 24 T. L. R. 318; 13 Rly. Cas. 153—Rly. and Can. Com.

**23. Undue Preference—Purchase of Line by Railway Company from Trader—Payment in Cash and Services—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.**—In order to establish a case of undue preference the Court must be satisfied that there is something undue, unreasonable, or unfair in the railway company's treatment of the parties under investigation relatively to one another. A mere inequality in charge raises a presumption of undue preference, but that presumption may be rebutted. Inequality of rates may be explained and accounted for by a fair and honest bargain the consideration for which has been duly conveyed to and is enjoyed by the railway company. An agreement of purchase between a railway company and a trader, whereby the latter receives payment, partly in cash and partly in railway services at rates lower than those charged to other persons, must be viewed by the Court with jealousy in order to see that it does not contravene those fundamental principles of equality which should regulate the dealings of a railway company with its customers; but the Court cannot hold as a matter of law that payment for railway services or accommodation must take the form of cash.

**HOLWELL IRON CO., LD. v. MIDLAND RY. CO.**, [1909] 1 K. E. 186; 78 L. J. K. E. 214; 100



**I. Railways—Continued.**

L. T. 204; 25 T. L. R. 158; 13 Rly. Cas. 244  
—Rly. and Can. Com.

Affirmed. 26 T. L. R. 110—C. A.

**24. Undue Preference—Through Rates—Practice—Joinder of Defendants.**—Where traders complain that a through rate is an undue preference, all the railway companies who are parties to the rate complained of must be made defendants.

CHANCE AND HUNT, LD. *v.* LONDON AND NORTH-WESTERN RY. CO., [1909] 1 K. B. 550; 78 L. J. K. B. 305; 100 L. T. 384; 13 Rly. Cas. 286—Rly. and Can. Com.

**25. Classification—Adding New Article—"Fruit"**—*Unripe Bananas—Railway and Canal Traffic Act, 1888* (51 & 52 Vict. c. 25), s. 24, sub-s. 11—*London and North-Western Railway Company's (Rates and Charges) Order Confirmation Act, 1891* (54 & 55 Vict. c. cxxi.), Sched.]—Unripe bananas are not included under the word "fruit" in the classification of merchandise traffic in the schedule to the London and North-Western Railway Company's (Rates and Charges) Order Confirmation Act, 1891, and the Board of Trade has therefore jurisdiction under sect. 24, sub-sect. 11, of the Railway and Canal Traffic Act, 1888, to make an order for their insertion in Class I., and to add the qualifications "loose, minimum 20 cwt. per wagon."

EX PARTE LONDON AND NORTH-WESTERN [RY. CO., 100 L. T. 998; 25 T. L. R. 507—Div. Ct.

**26. Undue Preference—Rival Traders Served by Different Railways—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 27.]—A trader whose works are served by one railway company under less favourable terms than the works of his rival are served by another railway company cannot penalise the company giving the more favourable terms by recovering the value of any difference in treatment as an undue prejudice to him or undue preference to his rival.**

Decision of Rly. and Can. Com. (25 T. L. R. 491) affirmed (Fletcher-Moulton, L.J. dissenting).

LEVER BROTHERS, LD. *v.* MIDLAND RY. CO., [101 L. T. 438; 25 T. L. R. 768; 13 Rly. Cas. 301—C. A.

**27. Application for Rate—Public Interest—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 25, sub-s. 5.]—The applicants asked the Court to allow a through rate of 1s. 2d. per ton for slack from certain collieries to their works to be forwarded in quantities of not less than 600 tons per week. The mean distance from the collieries to the applicants' works by the route proposed was twenty-four miles, while the route by which the traffic was in fact sent was thirty-four miles, and the rate charged by either route was the same, namely, 1s. 11d. per ton.**

HELD—that in the absence of evidence to show that the proposed rate would afford any

benefit to the public, the application must be refused.

BRUNNER, MOND & CO., LD. *v.* CHESHIRE [LINES COMMITTEE AND LONDON AND NORTH-WESTERN RY. CO., 25 T. L. R. 618—Rly. and Can. Com.

**28. Unreasonable Increase—Complaints by Other Traders of Undue Preference of Applicants—Notice of Increase—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 33.]—By an arrangement between the applicants and the railway company in 1906 the applicants' soap was carried by the railway company at rates based upon its computed weight, which was, in fact, substantially less than its actual weight. In 1907 other traders, whose traffic was carried at rates based upon actual weight, complained of the undue preference accorded by means of the computed weights (see *Lever Bros., Ltd. v. Midland Ry. Co., supra*), and thereupon the railway company adopted the practice of charging all consignments at actual weight. The applicants complained of this change of rate as an unreasonable increase, and as illegal, inasmuch as public notice was not given of the same as prescribed by sect. 33 of the Railway and Canal Traffic Act, 1888.**

HELD—that the application must be dismissed, and that the railway company had taken a reasonable step in altering the computation when they found it inaccurate.

J. WATSON & SONS, LD. *v.* MIDLAND RY. CO., [25 T. L. R. 805; 13 Rly. Cas. 339—Rly. & Can. Com.

Affirmed on appeal, 26 T. L. R. 166—C. A.

**29. Increase—Mineral Traffic—Increase of Cost—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1.]—In 1895 a railway company was authorised to increase its rate for mineral traffic by 2½ per cent. In 1907 the company gave notice of its intention to raise the rate by an additional 2½ per cent. On a claim by the applicants for a declaration that this increase was unreasonable,**

HELD—upon the evidence that such increase was justifiable in view of the increased cost to the railway company of the carriage of mineral traffic.

SOCIETY OF COAL MERCHANTS *v.* MIDLAND [RY. CO., 26 T. L. R. 135—Rly. and Can. Com.

**30. Increase—Proof of—Reasonableness—Burden on Railway Company—Comparison of Routes—Suggestion of Undue Preference—Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1.]—The burden on a railway company of showing that an increase in rates is reasonable is not discharged by the mere suggestion that the lower rates involved some undue preference. Every higher rate is not a ground for increasing every lower one. Where the compared routes are over the lines of different railway companies as to part of the routes, and the charge is made in respect of different lines by**

**I. Railways—Continued.**

different railway companies, there can be no argument from undue preference.

GRAYSON, LOWOOD & CO., LD. AND SILICA [FIRE BRICK CO. v. GREAT CENTRAL RY. AND OTHERS, 13 Rly. Cas. 281—Rly. and Can. Com.

**31. Railway Company's Vessel—Bill of Lading—Unreasonable Condition—Liability of Company—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7—Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 31.]—A railway company contracted to carry a cargo by one of their steamers under a bill of lading, which contained a clause excepting them from liability for every kind of negligence on the part of any of their servants.**

HELD—that in the absence of a *bonâ fide* alternative rate for the carriage of the cargo, such a condition was void as being unreasonable within the meaning of sect. 7 of the Railway and Canal Traffic Act, 1854.

RIGGALL & SONS v. GREAT CENTRAL RY. CO., [101 L. T. 392; 25 T. L. R. 754; 53 Sol. Jo. 716; 14 Com. Cas. 259—Pickford, J.

**31a. Short Distance Traffic—Conveyance over Two Railways—"Conveyed by the Company"—London and North-Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. cxxi.), Sched., cl. 11.]—By clause 11 of the schedule to the London and North-Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, where merchandise is conveyed for an entire distance not exceeding a certain distance, the company may charge for conveyance as for that distance, "provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway."**

HELD by Vaughan Williams and Fletcher Moulton, L.J.J. (Buckley, L.J., dissenting)—that the words "conveyed by the company" mean actually conveyed or carried by the company's own engines, and do not refer merely to the contract of carriage, and that therefore, where A. company hauled traffic for three miles on its own line, and B. company then hauled it for two miles on its line, the section did not apply.

Decision of the Railway and Canal Commission ([1906] 1 K. B. 577; 75 L. J. K. B. 454; 95 L. T. 62) affirmed.

LANCASHIRE AND CHESHIRE COAL ASSOCIATION AND RICHARD EVANS & CO. v. LONDON AND NORTH-WESTERN RY. CO. AND LANCASHIRE AND YORKSHIRE RY. CO., [1907] 2 K. B. 902; 76 L. J. K. B. 1020; 97 L. T. 569; 23 T. L. R. 645; 13 Rly. Cas. 8—C. A.

(iii.) *Passenger Fares.*

See TRAMWAYS, No. 5.

(iv.) *Mails.*

**32. Conveyance by Railway Company—Measure of Remuneration to the Railway Com-**

**pany—Railways (Conveyance of Mails) Act, 1838 (1 & 2 Vict. c. 98), s. 6.]—Upon an application to determine the amount of the remuneration to be paid per annum by the Postmaster-General to the Great Northern Railway Company (Ireland) for the conveyance of mails on their railway:**

HELD—that to arrive at a "reasonable remuneration" to be paid for the conveyance of mail bags, the railway company's ordinary scale of rates as published in its time-tables should be adopted, less 25 per cent. in respect of terminal services performed in the case of similar traffic for ordinary traders, but not performed in the case of mails, and less 10 per cent. in respect of the quantity and regularity of the mails and the facility and economy with which they are handled as compared with traders' parcels.

HELD FURTHER—that in respect of "notice" trains (*i.e.*, statutory trains run compulsorily by the railway company, and absolutely under the control of the Postmaster-General, but carrying also ordinary passengers and parcels) the proper principle upon which the railway company's remuneration should be based was to ascertain the cost of running each train, to add (1) a fair and reasonable profit, and (2) an additional sum in consequence of the running of those trains fettering the company's freedom in the working of their system, and against the sum thus ascertained to credit the Postmaster-General with the annual earnings of each train, and where those earnings fell short of the sum of the three items on the debit side, the difference should be paid by the Postmaster-General.

GREAT NORTHERN RY. CO. (IRELAND) v. HIS [MAJESTY'S POSTMASTER-GENERAL, 25 T. L. R. 511; 13 Rly. Cas. 290—Rly. and Can. Com.

(v.) *Duty towards Passengers, etc.*

See also NEGLIGENCE, Nos. 6, 7.

**33. False Imprisonment—Special Constable—Liability of Company for Acts of Constable—Great Eastern Railway (General Powers) Act, 1900 (63 & 64 Vict. c. cx.), s. 50.]—Under sect. 50 of the Great Eastern Railway (General Powers) Act, 1900, the relation of master and servant is created between the railway company and a special constable appointed by virtue of that section; and if such constable arrests a person on suspicion of felony without reasonable grounds for believing that a felony has been committed by him the railway company is liable.**

LAMBERT v. GREAT EASTERN RY. CO., [1909] 2 K. B. 776; 101 L. T. 408; 73 J. P. 445; 25 T. L. R. 734; 53 Sol. Jo. 732—C. A.

(vi.) *Trespass on Railway.*

[No paragraphs in this vol. of the Digest.]

(vii.) *Locomotives.*

[No paragraphs in this vol. of the Digest.]

(viii.) *Receivers.*

[No paragraph in this vol. of the Digest.]



## II. CANALS.

*See also* DEPENDENCIES, No. 20; HIGHWAYS, No. 19.

**34. Public Waterway — Statutory Duty to Maintain Water Supply.—***Abstraction of Water by Railway Company—Prescriptive Claim to Surplus Water Injunction.*—The plaintiff company, under the powers of their special Act, acquired two existing statutory undertakings for maintaining and preserving the navigation of the river Dun, in Yorkshire, as a waterway for the use of the public. The river Cheswold was a branch of the river Dun and formed part of the navigation. The water of the rivers was not expressly vested by the legislature in the navigating authority. The defendant railway company owned land adjoining the Cheswold, and for upwards of twenty years past had abstracted large quantities of water from this river to supply their locomotives and for other purposes of their railway. This action was brought by the Attorney-General at the relation of the plaintiff company and by the plaintiff company for an injunction restraining the defendants from abstracting the water as aforesaid in breach of the public rights in the navigation. The defendants did not admit that the plaintiff company owned the water of the river, and alternatively they set up a prescriptive right to use the water from the Cheswold, the same being water not required for the purposes of the navigation, but disclaimed any right to interfere with the statutory rights and duties of the plaintiff company.

It was proved that the defendants had taken water without reference to the requirements of the navigation.

Neville, J., held that inasmuch as the user proved by the defendants was a prescription unlimited by the requirements of the navigation, the defendants could not limit their claim to a right to use surplus water only, and granted an injunction. On appeal by the defendants:—

**HELD**—that the plaintiff company, having regard to the disclaimer of the defendants, had no title to sue, inasmuch as they had no property in the water, and that no question of prescription arose.

*Quære*, whether the fact that the defendants had not stated that the water which they claimed to take was surplus water, and that they might have taken water in excess of what was surplus water, was any answer to their claim to a prescriptive right.

Decision of Neville, J. (99 L. T. 695; 72 J. P. 442) reversed.

**ATTORNEY-GENERAL v. GREAT NORTHERN**  
[Ry. Co., [1909] 1 Ch. 775; 78 L. J. Ch. 577;  
73 J. P. 41—C. A.]

**35. Construction of Works—Works Not Constructed in Accordance with Statutory Requirements — Injunction — Laches — Application by Attorney-General at Relation of Urban Council — Union and Grand Junction Canal Act, 1810 (50 Geo. 3, c. 122).]**—Under the powers conferred by an Act passed in 1810 the predecessors of the de-

fendant company constructed reservoirs and executed various costly works which had the effect of conducting or diverting into the canal made by them streams or portions of streams which would otherwise have flowed into the river Avon. These works were openly constructed and were all completed about sixty years ago or were in operation for more than forty years before 1894 and ever since that date. In 1894 the canal and undertaking were transferred to the defendants by a statute which recited that the works had been constructed in accordance with the Act of 1810, and that the transfer was to be subject to the defendants performing and fulfilling "all continuing contracts, engagements, covenants, servitudes, obligations, and liabilities entered into or incurred by or attaching to" the original company. An action was brought by the Attorney-General at the relation of an urban district council, who also sued as plaintiffs, alleging that the works which had been constructed by the defendants' predecessors were not in accordance with the requirements of the Act of 1810, and claiming an injunction to restrain the defendants from permitting the works to remain so constructed as not to comply with the Act of 1810.

**HELD**—(1) that the urban district council were not entitled to the relief claimed, having regard to the remote period at which the works complained of were executed and to the terms of the statutory transfer, and (2) that, as to the claim by the Attorney-General at the relation of the urban district council, the Court had a discretion with respect to granting relief by injunction, and that in the circumstances such relief ought not to be granted.

**ATTORNEY-GENERAL v. THE GRAND JUNCTION**  
[CANAL Co., [1909] 2 Ch. 505; 78 L. J. Ch. 681; 101 L. T. 150; 73 J. P. 421; 25 T. L. R. 720; 7 L. G. R. 1014—Joyce, J.]

## III. RAILWAY AND CANAL COMMISSIONERS.

**36. Jurisdiction—Running Powers conferred by Special Act—Provisions in Agreement for Arbitration — Not specifically Authorised by Special Act—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48). s. 8—Railway and Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 15.]**—In pursuance of powers conferred by a special Act and sect. 87 of the Railways Clauses Consolidation Act, 1845, an agreement was made between two railway companies as to certain running powers. By a clause in the agreement any differences arising thereunder were to be determined under the Railway Companies Arbitration Act, 1859. By the special Act the terms, conditions and regulations with regard to the running powers were, in default of agreement, to be determined in the manner provided for the settlement of differences between railway companies by the Regulation of Railways Act, 1873, as amended by the Railway and Canal Traffic Act, 1888.

**HELD** (Buckley, L.J. dissenting)—that the provisions in the agreement for arbitration, although not confirmed or specifically authorised by a special Act, were "provisions of an agreement confirmed or authorised by a general or



III. Railway and Canal Commissioners—Continued.

special Act" within the meaning of sect. 15 of the Railway and Canal Traffic Act, 1888, and that, as no arbitrator had been designated by name or office in any general or special Act, the Railway Commissioners had jurisdiction to decide the differences between the companies.

GREAT WESTERN RY. CO. v. BARRY RY. CO., [1909] 2 K. B. 670; 78 L. J. K. B. 1010; 101 L. T. 448; 13 Rly. Cas. 362—C. A.

37. Jurisdiction — Differences between Railway Companies—Statutory Agreement for Arbitration — Named Arbitrator or Arbitrator appointed by Board of Trade—Death of Named Arbitrator—Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8.]—A statutory agreement provided that differences between two railway companies as to its effect and construction should be referred to H., or, him failing, to an engineer to be appointed by the Board of Trade, on the application of either party, H. having died.

HELD—that the proviso to sect. 8 of the Regulation of Railways Act, 1873, applied, and that the Railway Commissioners could not compel a reference under that section, since an arbitrator had in a "general or special Act been designated by his name."

ALEXANDRA (NEWPORT AND SOUTH WALES) DOCKS AND RY. CO. v. TAFF VALE RY. CO., [1907] 1 K. B. 356; 76 L. J. K. B. 303; 96 L. T. 380; 13 Rly. Cas. 1—C. A.

38. Practice—Intervention of Third Party—Association of Traders or Freighters—Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 7.]—Leave granted to the Association of Private Owners of Rolling Stock under sect. 7 of the Railway and Canal Traffic Act, 1888, to intervene in the hearing of this case, on the ground of common interest with the defendants, a statement of the points to be raised by the association to be delivered to the parties before the hearing, the question of costs to be considered at the trial.

GREAT WESTERN RY. CO. v. SPILLERS AND BAKERS, LD., Times, March 3rd, 1909—Rly. and Can. Com.

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I. COUNTY RATE.

[No paragraphs in this vol. of the Digest.]

II. DRAINAGE RATE.

1. Drainage Scheme—Apportionment of Special Expenses — Precept to Overseers — Complaint for Non-payment—Adjournment Pending Appeal against Apportionment—Expiry of Overseers' Year of Office — Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 229, 231.]—An apportionment of the special expenses of a drainage scheme was made by the appellants, a rural district council, on October 11th, 1907, and a precept was issued by them on October 25th, 1907, directing the respondents, who were at that time overseers of the poor, to pay the amount of the contribution of their parish. On January 22nd, 1908, the respondents appealed to the Local Government Board against the apportionment. On February 5th, 1908, the appellants summoned the respondents for non-payment of the amount of the precept. The justices, pending the decision of the Local Government Board, from time to time adjourned the hearing. The respondents went out of office in the month of April, 1908. On July 25th, 1908, the Local Government Board confirmed the apportionment. The complaint came before the justices for final hearing on August 26th, 1908, and was dismissed by them on the ground that the respondents were no longer the overseers of the parish.

HELD—that the justices' decision was right. PLYMPTON ST. MARY RURAL DISTRICT [COUNCIL v. REYNOLDS AND ANOTHER, [1909] 1 K. B. 768; 78 L. J. K. B. 417; 100 L. T. 394; 73 J. P. 156; 7 L. G. R. 509—Div. Ct.

III. GENERAL DISTRICT RATE

(a) In General.	
[No paragraphs in this vol. of the Digest.]	

## III. General District Rate—Continued.

## (b) Exemption.

2. *Tramroad—Railway—Partial Exemption—Tramroad Rated at Full Amount—Non-payment of Rate—Application for Distress Warrant—“Sufficient Cause for Non-payment of Rate”—Jurisdiction of Justices to Issue Distress Warrant for Less than Full Rate*—5 Vict. c. xlix., ss. 250, 270—*Provisional Order of May 22nd, 1882, art. 3—Local Government Board’s Provisional Orders Confirmation (No. 9) Act, 1882 (45 & 46 Vict. c. ciii.).*—By a local Act it was provided that “any justice shall, on the application of the commissioners or their collector, summon any person (rated under the authority of the Act) to appear before him . . . to show cause why the rates due from him should not be paid; and in case no sufficient cause for the non-payment of such rate shall be shown accordingly, the same shall be levied by distress, and such justice shall issue his warrant accordingly.”

The respondents were summoned for non-payment of £525 19s. 8d., the amount of an improvement rate made under the local Act. Before the justices it was admitted by the appellant that the rated portion of the respondents’ tramroad was a continuation of the same tramroad which in the urban district of Thornton had been held by the Court of Appeal to be a “railway.” A “railway constructed under the powers of an Act of Parliament for public conveyance” was, by virtue of the local Act as amended by a provisional order, liable to be rated at one-fourth only of its net annual value; but it was contended by the appellant that, if the respondents were aggrieved by the rate, they should have appealed to Quarter Sessions. The justices were of opinion that the respondents had shown sufficient cause for non-payment of the full amount of the rate claimed, and, the appellant’s and the respondents’ solicitors having agreed that one-fourth part of the net annual value of the tramroad would reduce the rate thereon to £255 15s. 8d., they made an order for payment of that amount, and that on default being made in payment thereof a distress warrant should issue.

HELD (Bigham, P., dissenting)—that, in view of the admission made by the appellant, the justices were right in declining to issue a distress warrant for the full amount of the rate demanded.

DIXON v. BLACKPOOL AND FLEETWOOD TRAM-ROAD CO., [1909] 1 K. B. 860; 78 L. J. K. B. 637; 100 L. T. 403; 73 J. P. 219; 25 T. L. R. 323; 7 L. G. R. 390—Div. Ct.

3. *Tramroad—Land Used as a Railway—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (b)—Blackpool and Fleetwood Tramroad Act, 1896 (59 & 60 Vict. c. cxlvii.).*—A tramroad was constructed under the powers of a special Act to connect two tramway lines at each end of the tramroad. The Act incorporated certain provisions of the Railways Clauses Act, 1845, and of the Tramways Act, 1870, the provisions of the former Act to apply only to the tramroad, and for the purposes thereof “the

tramroad shall be deemed to be a railway,” and the provisions of the latter Act to apply only to the tramway. The tramroad, which in appearance was like a railway, was constructed on land belonging to the tramroad company and was fenced off from the adjoining lands, except where it crossed roads on the level. The tramroad and tramways were worked as one undertaking.

HELD—that the tramroad was a “railway” within sect. 211, sub-s. 1 (b) of the Public Health Act, 1875, and was assessable to the general district rate at only one-fourth of its net annual value.

Decision of C. A. ([1907] 1 K. B. 568; 76 L. J. K. B. 492; 96 L. T. 209; 71 J. P. 177; 23 T. L. R. 267; 5 L. G. R. 422) affirmed.

THORNTON URBAN DISTRICT COUNCIL v. [BLACKPOOL AND FLEETWOOD TRAMROAD CO., [1909] A. C. 264; 78 L. J. K. B. 517; 100 L. T. 657; 73 J. P. 299; 25 T. L. R. 481; 53 Sol. Jo. 445; 7 L. G. R. 687—H. L.

## (c) Occupation.

[No paragraphs in this vol. of the Digest.]

## (d) Retrospective Rate.

[No paragraphs in this vol. of the Digest.]

## IV. METROPOLITAN RATING.

4. *Alteration in Value—Railway—Reduction in Receipts—Competition—Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 47.*—Where in the course of any year the value of a hereditament has been reduced, and the overseers of the parish have, on the written requisition of a ratepayer under sub-sect. 1 of sect. 47 of the Valuation (Metropolis) Act, 1869, refused to make a provisional list containing the gross and rateable value as so reduced of such hereditament, the assessment committee are bound, under sub-sect. 2 of the same section, on a *prima facie* case of a reduction in value being established, to appoint a person to make such provisional list.

Evidence having been given by a railway company of a continual reduction in their receipts in a metropolitan parish owing to the increased competition of tramways, tubes, and motor-omnibuses, and that such reduction in their receipts involved a reduction in the rateable value of their property in the particular parish:—

HELD—that they had established a *prima facie* case of an alteration in value within sect. 47 of the Valuation (Metropolis) Act, 1869, so as to entitle them to require the assessment committee to appoint a valuer under sub-sect. 2 of that section.

Decision of Div. Ct. (25 T. L. R. 49) affirmed R. v. SOUTHWARK BOROUGH ASSESSMENT COMMITTEE, EX PARTE SOUTH EASTERN AND CHATHAM RY. CO.’S COMMITTEE, [1909] 1 K. B. 274; 78 L. J. K. B. 319; 100 L. T. 136; 73 J. P. 75; 25 T. L. R. 144; 53 Sol. Jo. 133; 7 L. G. R. 287—C. A.

## IV. Metropolitan Rating—Continued.

5. *Metropolitan Water Board—Water Mains—Method of Assessment—Parochial Assessment Act, 1836* (6 & 7 Will. 4. c. 96). s. 1.]—On an appeal by the Metropolitan Water Board against the valuation lists of 101 parishes in the City of London Union in respect of their mains and service pipes, certain of which were only indirectly productive to the Board, quarter sessions arrived at the rateable value of the property of the Board in the parishes in question by the following method:—They found the gross receipts of the undertaking of the Board (which, they held, could only be valued as a whole) to be £2,761,974; from that sum they made various deductions in respect of working expenses, tenants' share, and other matters, and arrived at the figure of £783,888 (which represented 29·57 per cent. of the total water receipts) as the rateable value *plus* rates of the directly profitable portion of the whole undertaking; they then applied this percentage to the total water receipts in the 101 parishes and thus ascertained the rateable value *plus* rates of the directly productive portion of the Board's undertaking in those parishes; and to the sum so found they added the rateable value of the indirectly productive portion of the undertaking in those parishes, the final result of the calculation being the sum of £33,798, which they held to be the rateable value of the Board's undertaking in the 101 parishes. On an appeal by the assessment committee of the City of London Union:—

HELD—that upon the facts before them the quarter sessions had not gone wrong in law, and that the appeal must be dismissed.

METROPOLITAN WATER BOARD *v.* ASSESSMENT COMMITTEE OF THE CITY OF LONDON, 73 J. P. 142; 25 T. L. R. 246; 7 L. G. R. 318—Div. Ct.

6. *Rating of Owners—House Wholly Let Out in Apartments or Lodgings—Representation of the People Act, 1867* (30 & 31 Vict. c. 102), s. 7—*Poor Rate Assessment and Collection Act, 1869* (32 & 33 Vict. c. 41), ss. 3, 4, 6.]—The owners of dwelling-houses in boroughs wholly let out in apartments or lodgings not separately rated are liable to be rated under sect. 7 of the Representation of the People Act, 1867; and are not then entitled to the deductions allowed by sects. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869.

The provisions of sects. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869, do not affect sect. 7 of the Act of 1867 in any respect.

*Davis v. Wallis* ([1908] 2 K. B. 134; 77 L. J. K. B. 432; 98 L. T. 411; 72 J. P. 165; 24 T. L. R. 350; 6 L. G. R. 493—Div. Ct.) overruled.

WHITE AND HALES *v.* ISLINGTON BOROUGH COUNCIL, [1909] 1 K. B. 133; 78 L. J. K. B. 168; 100 L. T. 22; 73 J. P. 44; 25 T. L. R. 121; 53 Sol. Jo. 97; 7 L. G. R. 133—C. A.

7. *Rating of Owners—House Wholly Let Out in Apartments or Lodgings—Meaning of "Owner"—Agent Receiving the Rack-Rent—Representa-*

*tion of the People Act, 1867* (30 & 31 Vict. c. 102), s. 7—*Poor Rate Assessment and Collection Act, 1869* (32 & 33 Vict. c. 41), s. 20.]—In the last clause of sect. 7 of the Representation of the People Act, 1867, which enacts that where a dwelling-house or tenement is wholly let out in apartments or lodgings not separately rated, the owner shall be rated in respect thereof to the poor rate, the word "owner" does not include a person receiving the rack-rent as agent for another person.

NOKES *v.* STRONG, [1909] 2 K. B. 625; 78 [L. J. K. B. 1041; 101 L. T. 318; 73 J. P. 417; 7 L. G. R. 876—Div. Ct.]

8. *Exhibition Premises—Provisional List—Reduction in Value—Valuation (Metropolis) Act, 1869* (32 & 33 Vict. c. 67), s. 47 (1), (2), (8).]—Under sect. 47 of the Valuation (Metropolis) Act, 1869, where a *prima facie* case of reduction in value is made out, the assessment committee are bound, on default of the overseers, to appoint a person to make a provisional list.

R. *v.* HAMMERSMITH ASSESSMENT COMMITTEE, [EX PARTE SHEPHERD'S BUSH IMPROVEMENTS, LD., 101 L. T. 543; 73 J. P. 433; 7 L. G. R. 1044—Div. Ct.]

## V. POOR RATE.

## (a) In General.

[No paragraphs in this vol. of the Digest.]

## (b) Appeal.

9. *Notice of Objection to Valuation List—Rate made while Objection Undetermined—Appeal Against—No Necessity for New Objection—Union Assessment Committee Act, 1862* (25 & 26 Vict. c. 103), s. 24—*Union Assessment Committee Amendment Act, 1864* (27 & 28 Vict. c. 39), s. 1.]—On May 16th, 1900, a valuation list for the parish of Ystradfydwg was approved by the assessment committee of the Pontypridd Union, and it contained a hereditament belonging to the Rhondda Valley Breweries Company. Supplemental valuation lists were subsequently approved for the parish by the assessment committee at various dates, including December 4th, 1901, October 10th, 1906, and April 10th, 1907. The hereditament in question was specifically referred to in the list approved on December 4th, 1901, but not in any of the other supplemental lists. On November 1st, 1906, a rate was allowed by the justices in accordance with the valuation list then in force, and on November 4th, 1906, notice of the rate being allowed was published. The Rhondda Valley Breweries Company on November 10th, 1906, gave the assessment committee notice of objection to the last deposited valuation list, and the objections were heard on November 30th, 1906. A rate was made on April 15th, 1907, and on May 22nd, 1907, the assessment committee gave their decision upon the above-mentioned objections and confirmed the assessment. The company thereupon, on June 8th, 1907, gave notice of appeal against the rate made on April 15th, 1907. No other notice of objection to the valuation list was given than that above mentioned, and no appeal was entered



**V. Poor Rate—Continued.**

by the company against the rate made on November 1st, 1906.

The appeal was entered at the quarter sessions held on July 2nd, 1907, and was, on the application of the assessment committee, resited to the next sessions.

**HELD**—that the brewery company having given a notice of objection on November 10th, 1906, to the last deposited valuation list, and not having appealed from the rate made on November 1st, 1906, and no decision having been given by the assessment committee before the date of the making of the next rate, viz., April 15th, 1907, they were entitled to appeal against the subsequent rate without having given a fresh notice of objection.

Decision of Div. Ct. (77 L. J. K. B. 816; 98 L. T. 647; 72 J. P. 365; 6 L. G. R. 817) affirmed.

**HELD ALSO**—that the assessment committee having obtained a respite did not thereby waive their right to raise a preliminary objection in the nature of a statutory condition to the right of appeal.

Decision of Div. Ct. (*supra*) reversed on this point.

**RHONDDA VALLEY BREWERIES CO., LD. v. [PONTYFRIDD UNION ASSESSMENT COMMITTEE, [1909] 1 K. B. 652; 78 L. J. K. B. 432; 100 L. T. 587; 73 J. P. 177; 53 Sol. Jo. 242; 7 L. G. R. 428—C. A.**

**10. Notice of Appeal—Notice to Assessment Committee—Entry and Respite of Appeal in Absence of Notice—Union Assessment Committee Act, 1864 (27 & 28 Vict. c. 39), s. 1.**—An appellant to quarter sessions against a poor rate has the same right to have an appeal entered and resited where he has omitted to give the twenty-one days' notice to the assessment committee, required by sect. 1 of the Union Assessment Committee Act, 1864, as he has where he has omitted to give the notice to the overseers (or their successors in this respect), required by sect. 4 of the Poor Relief Act, 1743. Consequently, where the appellant appeals to the next quarter sessions without giving the twenty-one days' notice to the assessment committee, the quarter sessions are bound to enter and respite the appeal with a view to its being heard at the succeeding quarter sessions, if due notice is given in the meantime.

Decision of C. A. (reported *sub nom. R. v. West Riding of Yorkshire Justices*, [1908] 2 K. B. 635; 77 L. J. K. B. 914; 99 L. T. 417; 72 J. P. 209; 6 L. G. R. 964) affirmed.

**DENABY OVERSEERS AND OTHERS v. DENABY [AND CADEBY MAIN COLLIERIES, LD., [1909] A. C. 247; 78 L. J. K. B. 541; 100 L. T. 711; 73 J. P. 297; 53 Sol. Jo. 418; 7 L. G. R. 705—H. L.**

**(c) Assessment.**

**11. Deduction of Rent-charge Imposed for Sea Defence Purposes—Expense Necessary to Command Rent—Rent-charge Affecting Some only of Protected Hereditaments—Parochial**

**Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.]**—By a local Act certain lands in a level under the jurisdiction of commissioners of sewers were made subject to annual rent-charges for the purpose of raising the funds necessary for the protection of the lands against incursions of the sea. Other lands in the level which were also protected by the same works were exempt from any liability to contribute towards the costs of the works.

**HELD**—that the appellant (the tenant) was entitled to a deduction in calculating the rateable value of his premises in respect of the rent-charge or such proportion thereof as was the proper share of his premises.

Decision of C. A. ([1907] 2 K. B. 460; 76 L. J. K. B. 753; 97 L. T. 413; 71 J. P. 263; 5 L. G. R. 892) reversed.

**GREEN v. NEWPORT UNION ASSESSMENT COMMITTEE, [1909] A. C. 35; 78 L. J. K. B. 97; 99 L. T. 893; 73 J. P. 17; 25 T. L. R. 67; 53 Sol. Jo. 60; 7 L. G. R. 258—H. L.**

**12. Railway—Link Line Connecting two Railway Systems—Basis of Assessment—Rent Reasonably to be Expected—Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.**—A railway line, about eight miles in length, and without any station or sidings on it, connected the appellants' line at Woodford with the Great Western Railway Company's line at Banbury. A length of such line, about one mile 47 chains, was in the Banbury Union. The line was constructed by the appellants under their special Act, and the cost of construction, about £280,000, was, by agreement, advanced to the appellants by the Great Western Railway Company at 3½ per cent. per annum.

**HELD**—that in assessing the line for poor rate purposes the interest on the cost of construction was not to be taken into account.

The amount that a tenant might "reasonably" be expected to give is not to be arrived at by assuming that he already controls all the rest of the line, and is driven by his necessities to pay excessively for the single link line he does not control. Each section must be regarded as a profit-earning part of the system to which it belongs, each section being indispensable to the working of the system. The resulting inquiry to be made is: how much of the rent that a tenant would give if the whole system were let to him at once is applicable to the particular section to be assessed? That depends on profit-earning, not upon the cost of construction.

Decision of C. A. ([1907] 1 K. B. 717; 76 L. J. K. B. 577; 71 J. P. 157; 96 L. T. 243; 23 T. L. R. 283; 5 L. G. R. 328) reversed.

**GREAT CENTRAL RY. CO. v. BANBURY UNION [ASSESSMENT COMMITTEE, [1909] A. C. 78; 78 L. J. K. B. 225; 100 L. T. 89; 73 J. P. 59; 25 T. L. R. 143; 53 Sol. Jo. 177; 7 L. G. R. 227—H. L.**

**13. Railway—Profits Attributable to the Occupation of Portions of the Railway outside the Parish—Evidence—Admissibility.**—In the assessment for rating purposes of a section of railway situate in parish A. the railway company

V. **Poor Rate**—*Continued.*

offered to prove that part of the profits of the line in that parish was attributable, not to their occupation of the line in that parish, but to their occupation of the line in parish B., and that in the assessment of their line in parish B. it had been held that profits made outside the parish, including profits in parish A., were attributable to their occupation of the line in parish B., and that the rateable value of the line in the latter parish had been increased accordingly.

**HELD**—that the decision in this case was a corollary of the decision in *Great Central Ry. Co. v. Banbury Union Assessment Committee* (*supra*).

Decision of C. A. ([1908] 1 K. B. 750; 77 L. J. K. B. 484; 72 J. P. 139; 98 L. T. 543; 6 L. G. R. 377) reversed.

**SHEFFIELD UNION v. GREAT CENTRAL RY. CO.**, [1909] A. C. 78; 78 L. J. K. B. 225; 100 L. T. 89, 95; 73 J. P. 62; 53 Sol. Jo. 177; 7 L. G. R. 242—H. L.

**14. Valuation List**—*Objection before Assessment Committee*—No Power to Raise the Assessment of Objector—*Union Assessment Committee Act, 1864* (27 & 28 Vict. c. 39), s. 1.] When a ratepayer objects before the assessment committee that his premises are assessed at too high a figure, the committee have no power to raise his assessment. If they do so, a rate made on such increased assessment is bad.

**HUDSON v. RHODES**, [1909] 1 K. B. 85; 78 L. J. K. B. 128; 99 L. T. 967; 73 J. P. 66; 7 L. G. R. 159—Div. Ct.

(d) **Distress.**

**15. Distress Warrant**—*Costs*—*Justices' Discretion*—*Distress for Rates Act, 1849* (12 & 13 Vict. c. 14), s. 1.]—Justices have a discretion under sect. 1 of the Distress for Rates Act, 1849, as to whether they will award costs to a person applying for a warrant of distress for non-payment of poor rate.

**R. v. BAKER AND OTHERS, EX PARTE GUILD-FORD OVERSEERS**, 100 L. T. 522; 73 J. P. 166; 7 L. G. R. 422—Div. Ct.

(e) **Occupation.**

**16. Empty Building**—*Intention to Occupy*.]—A firm of manufacturers bought an empty building to use in the event of a fire on their premises or any other emergency. They put in a little steel shafting, and workmen's benches fixed to the floor. There was no motive power, and the building could not be used for their business until it was fitted up. Except for the fixtures mentioned, it was empty.

**HELD**—that nevertheless the firm were in occupation and rateable.

**BORWICK v. SOUTHWARK CORPORATION**, [1909] 1 K. B. 78; 78 L. J. K. B. 121; 99 L. T. 841; 73 J. P. 38; 7 L. G. R. 10—Div. Ct.

(f) **Rateability.**

**17. Burial Ground**—*Incumbent of Parish*—*"Occupier"*—*Receipt of Burial Fees*—*Poor Relief Act, 1601* (43 Eliz. c. 2), s. 1—*Poor Rate Exemption Act, 1833* (3 & 4 Will. 4, c. 30), s. 1.]

—A cemetery, which had been duly consecrated, was vested in the rector and incumbent of a parish by sect. 13 of the Church Building Act, 1845, for the use of the inhabitants of the parish. The rector received the burial fees paid in respect of interments therein.

**HELD**—that the rector was the occupier of the cemetery within the meaning of sect. 1 of the Poor Relief Act, 1601; that he received the burial fees as incidental to his occupation of the cemetery; and that he was therefore liable to be rated in respect thereof.

Decision of C. A. ([1908] 1 K. B. 835; 77 L. J. K. B. 661; 98 L. T. 781; 72 J. P. 172; 24 T. L. R. 388; 6 L. G. R. 427) affirmed.

**WINSTANLEY v. NORTH MANCHESTER OVERSEERS**, [1909] W. N. 233; 101 L. T. 616; 26 T. L. R. 90; 54 Sol. Jo. 80—H. L.

VI. **SEWER RATE.**

[No paragraphs in this vol. of the Digest.]

VII. **RECTOR'S RATE.**

**18. Non-residence of Rector**—*Alleged Non-performance of Parochial Duties*—57 Geo. 3, c. vii.]

—A rate was made under the Act 57 Geo. 3, c. vii., which was passed for the purpose of making better provision for the maintenance of the rector of the parish of St. Olave, Southwark, and which relieved the inhabitants of the parish from the obligation of paying tithe. The appellants objected to pay on the ground that the rector did not reside in the parish, and was not capable by reason of his employment as diocesan missionary of duly discharging his parochial duties, and they appealed to quarter sessions against an order for the payment of the rate.

**HELD**—that it was no objection to the rate that the rector was not living at the rectory, and that it was not open to the appellants to raise by way of appeal the contention that the rector was not performing his parochial duties.

**THE PROPRIETORS OF HAY'S WHARF, LD. v. TRUSTEES OF ST. OLAVE'S (SOUTHWARK)**, 73 J. P. 375; 25 T. L. R. 648; 7 L. G. R. 1022—Div. Ct.

**RATIFICATION.**

See AGENCY.

**REAL PROPERTY AND CHATTELS REAL.**

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GAGE ; PARTITION ; PERPETUITIES ;  
POWERS ; SALE OF LAND ; SETTLE-  
MENTS ; TRUSTS ; WILLS.

**I. GENERAL.**

1. *New River Company*—"Crown or King's Clogg"—*Transfer of Undertaking to Water Board*—*Rent-charge*—*Liability of Water Board*.]—The "Crown or King's Clogg," which was created in 1631 to replace the King's moiety in the New River Company, is a rent-charge which was charged on the fee and to be paid by the company as bailiffs out of the rent of the King's moiety, and not a mere personal covenant or a charge on or interest in a share of profits only and relating merely to partition of net profits. Therefore, since the transfer of the company's undertaking to the Metropolitan Water Board by the Metropolitan Water Act, 1902, which provided that "any rent-charges or other annual payment secured on the undertaking or income" should be secured on the water fund established by that Act, the Metropolitan Water Board is liable to pay the clogg, and not the New River Company as reconstituted for the purpose of receiving the purchase price of the undertaking.

Decision of Warrington, J., affirmed.

ADAIR v. NEW RIVER CO. AND METROPOLITAN  
[WATER BOARD, 25 T. L. R. 193—C. A.]

**II. ESTATES TAIL.****(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Disentailing.**

See MORTGAGE, No. 14.

**III. LAND TRANSFER.**

2. *Restrictive Conditions—Building Scheme—Effect of Registration—Land Transfer Act, 1875, s. 84—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Sched. I.*]—Registration under sect. 84 of the Land Transfer Act, 1875, as amended by Sched. I. of the Land Transfer Act, 1897, of restrictive conditions binding registered land, does not, of itself, whether by virtue of the Acts, or as evidence of a building scheme, render the conditions enforceable by or against purchasers of different portions of the registered land.

WILLÉ v. ST. JOHN, [1909] W. N. 229 ; 101 L. T. [558 ; 26 T. L. R. 87 ; 54 Sol. Jo. 65—Warrington, J.]

**IV. MERGER.**

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**RECEIPT.**

See EVIDENCE ; REVENUE.

**RECEIVERS.**

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**I. IN PARTNERSHIP PROCEEDINGS.**

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**II. BY WAY OF EQUITABLE EXECUTION.**

See also HUSBAND AND WIFE, No. 58.

1. *Patents—Foreigner—No other Property Within Jurisdiction.*]—The plaintiffs obtained judgment against the defendant, who was a foreigner resident abroad, and who had no property within the jurisdiction except three patents in respect of which it did not appear whether or not any business was being carried on by their use or whether there was anything receivable in respect of them. The plaintiffs applied for the appointment of a receiver by way of equitable execution of the rents, profits, and moneys receivable in respect of the defendant's interest in those patents.

HELD (Fletcher Moulton, L.J., dissenting)—that the order for the appointment of a receiver could not be made in such a case.

*Holmes v. Millage* ([1893] 1 Q. B. 551 ; 68 L. T. 205 ; 9 T. L. R. 331) followed.

J. J. EDWARDS & CO. v. PICARD, [1909] W. N. [191 ; 78 L. J. K. B. 1108 ; 101 L. T. 416 ; 25 T. L. R. 815—C. A.]

**III. IN GENERAL.**

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**RECEIVING STOLEN GOODS.**

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**RECOGNISANCES.**

See CRIMINAL LAW AND PROCEDURE ;  
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**RECREATION GROUNDS.***See* OPEN SPACES.**RECTIFICATION OF INSTRUMENTS.***See* CONTRACTS.**REFORMATORIES.***See* PRISONS AND REFORMATORIES.**REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.***See* EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INFANTS; POOR LAW.**REGISTRATION OF LAND.***See* CHARITIES; REAL PROPERTY AND CHATELS REAL.**REGISTRATION OF VOTERS.***See* ELECTIONS.**RELEASE.***See* CONTRACT; POWERS; REAL PROPERTY; TRUST.**REMAINDER.***See* REAL PROPERTY AND CHATELS REAL.**REMOTENESS.***See* PERPETUITIES.**RENT.***See* LANDLORD AND TENANT.**RENT-CHARGES AND ANNUITIES.**

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*See also* LOCAL GOVERNMENT, No. 10.**I. RENT-CHARGES.**

1. *Jointure — Arrears — Sale of Property Charged with Jointure—Charge on Proceeds of Sale Capital or Income—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. 2.*—Where a jointure rent-charge is charged upon land which is subsequently sold, the Court has jurisdiction to order the arrears of the jointure to be paid out of the proceeds of sale, and the Court in the exercise of its discretion will make such an order without prejudice to the question out of what fund such arrears are ultimately to be paid.

The Settled Land Act, 1882, sect. 21, sub-s. 2, applies to the arrears of a jointure rent-charge on the settled land.

IN RE DUKE OF MANCHESTER'S SETTLEMENT,  
[1909] W. N. 212; 26 T. L. R. 5; 53 Sol. Jo.  
868—Eve, J.

**II. ANNUITIES.**

2. *Direction to Purchase Annuity — Annuity-tant's Death—Payment of Sum Required to Purchase Annuity—Interest.*—B. bequeathed to his sister an annuity of £200; he declared that it was to begin at his death, and be payable quarterly, and he directed his executors to purchase a Government annuity in her name. They paid her a quarterly instalment in cash, but she died before they purchased the annuity and before a second payment became due.

HELD—that her representatives were entitled to such sum as would on the day when the first quarter became due and was paid have purchased for her an annuity of £200 paid quarterly with interest at 4 per cent. on such sum from the same date until payment.

IN RE BRUNNING, GAMMON v. DALE, [1909]  
[1 Ch. 276; 78 L. J. Ch. 75; 99 L. T. 918—  
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**REPAIRS AND IMPROVEMENTS.***See* LANDLORD AND TENANT; SETTLEMENTS.**REPLEVIN.***See* DISTRESS.**RES JUDICATA.***See* ESTOPPEL.

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See TRADE AND TRADE UNIONS.

**RESTRAINT ON ANTICIPATION.**

See HUSBAND AND WIFE; TRUSTS.

**RETAINER.**

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**REVENUE.**

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- (a) Carriage Duty.  
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- (b) Dealer in Plate.  
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- (c) Male Servants.  
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- (d) Publican's Licence Duty.  
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- (e) Saccharin.  
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- (f) Spirit Dealers.

1. Licence—Sweets or made Wine—Licence from Corporation of Oxford—*Excise Licences Act, 1825* (6 Geo. 4, c. 81), s. 26—*Customs and Inland Revenue Act, 1875* (38 Vict. c. 23), s. 9—*Revenue Act, 1889* (52 & 53 Vict. c. 42), s. 28—*Oxford Corporation Act, 1890* (53 & 54 Vict. c. cccxiii.), s. 119.]—The wine licence issued by the Corporation of the City of Oxford in exercise of the powers acquired by them from the University of Oxford under sect. 119 of the Oxford Corporation Act, 1890, includes the right to sell sweets or made wines.

ROBERTS v. TWINING AND OTHERS, 101 L. T. [41; 73 J. P. 317; 25 T. L. R. 525—Div. Ct.]

- (g) Tobacco.  
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**II. IN GENERAL.**

2. Prosecution for Keeping Dogs without Licence—Dismissal of Information on Payment of Sum for Costs—Claim by Crown to Costs in Excess of Court Fees—Dog Licences Act, 1867 (30 & 31 Vict. c. 5), s. 4—*Customs Consolidation Act, 1876* (39 & 40 Vict. c. 36), s. 235—*Summary Jurisdiction Act, 1879* (42 & 43 Vict. c. 49), s. 16—*Inland Revenue Regulation Act, 1890* (53 & 54 Vict. c. 21), s. 33.]—Proceedings were taken before justices by an inland revenue officer (who was not represented by a solicitor) against three persons for keeping dogs without having licences therefor. The justices dismissed the informations, but ordered each of the three defendants to pay a sum as costs, which sum was in excess of the Court fees. No application was made at the time for costs by the inland revenue officer.

## II. In General—Continued.

The sums so ordered to be paid as costs were paid to the clerk to the justices, who claimed to retain them on behalf of the county treasurer.

**HELD**—that the Crown was entitled to the costs paid by the defendants in excess of the Court fees.

**ATTORNEY-GENERAL v. CLARK**, [1909] 2 K. B. [7 : 78 L. J. K. B. 371 ; 100 L. T. 606 ; 73 J. P. 243 ; 25 T. L. R. 318—Channell, J.

**3. Duties Paid under Protest—Duties not Legally Exigible—Petition to Recover—Voluntary Payment.**—In *Whiteley v. Burns* ([1908] 1 K. B. 705 ; 77 L. J. K. B. 467 ; 98 L. T. 836 ; 72 J. P. 127 ; 24 T. L. R. 319 ; 52 Sol. Jo. 264—Div. Ct.) it was decided that certain duties were not exigible. The suppliants now claimed repayment of the duties paid by them during the years in respect of which they had protested that they were not liable.

**HELD**—that the case did not come within the class of cases dealing with money extorted or obtained *colore officii*, that the duties were paid voluntarily, and were not recoverable.

**WHITELEY, LD. v. R.**, 26 T. L. R. 19—Walton, J.

## III. STAMP DUTIES.

### (a) Bond, Covenant, etc.

**4. Agreement to Supply Electric Current—“Primary Security for Sum of Money at Stated Periods”—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.]**—By an agreement in writing a company undertook to supply electric current to another company for seven years. The consumers were to pay a fixed charge per quarter, and in addition *1d.* per Board of Trade unit, and provision was made for the increase or decrease of the quarterly payments on the increase or decrease of the capacity of the supply company's installation.

**HELD**—that this instrument was within the words “bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for a sum of money at stated periods for a definite and stated period,” in Sched. I. of the Stamp Act, 1891, and therefore liable to duty at the rate of *2s. 6d.* per cent. on the total amount of the minimum annual payments.

*National Telephone Co. v. Inland Revenue Commissioners* ([1900] A. C. 1 ; 69 L. J. Q. B. 43 ; 81 L. T. 546 ; 64 J. P. 420 ; 48 W. R. 210 ; 16 T. L. R. 58—H. L.) followed.

Decision of Channell, J. ([1909] 1 K. B. 737 ; 78 L. J. K. B. 374 ; 100 L. T. 613 ; 73 J. P. 237 ; 25 T. L. R. 348) affirmed.

**COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION CO., LD. v. INLAND REVENUE COMMISSIONERS**, [1909] 2 K. B. 604 ; 78 L. J. K. B. 1158 ; 101 L. T. 51 ; 73 J. P. 425 ; 25 T. L. R. 672—C. A.

### (b) Conveyance or Transfer on Sale.

[No paragraphs in this vol. of the Digest.]

### (c) Capital of Companies.

**5. Issue of Loan Capital—Existing Debenture Stock—Amalgamation—Rights of Holders of Existing Stock Modified and Altered—Liability of Issue of New Stock to Duty.**—A company, incorporated by special Act, had from time to time issued certain debenture stock, bearing interest at 4 per cent. By an amalgamation Act, which provided for a change of the name of the company, for the dissolution of the company, and the transfer of its undertaking to the new company, it was provided that on and from the date of the amalgamation the then existing debenture stock was to be divided into debenture stock of two classes, the A and B debenture stock, each bearing interest at 3 per cent., and the amount of the A and B debenture stock was to be 61 per cent. and 39 per cent. respectively of the total amount of the then existing debenture stock. The rights of each holder of existing debenture stock were to be modified so that his holding was to consist of 61 per cent. of A debenture stock and 39 per cent. of B debenture stock, bearing interest at 3 per cent., and each holder was to be entitled to a further amount of B debenture stock equal to one-third of the amount of existing debenture stock held by him. There was no provision in the Act that the existing debenture stock was to be cancelled or extinguished, but each holder of existing stock was to deliver up the certificates of the stock held by him and was to receive proper certificates in exchange, and he was to be no longer entitled to register the existing stock. The operation carried out under the Act did not involve the raising or obtaining from the public any additional capital.

**HELD**—that under the operation carried out by the amalgamation Act the issue of the A and B debenture stock was an “issue of loan capital” within the meaning of sect. 8, sub-sect. 1, of the Finance Act, 1899, and that the company were bound, under sub-sect. 2, to deliver a duly stamped statement of the total aggregate of such A and B debenture stock.

Decision of Walton, J. (95 L. T. 536) and C. A. (98 L. T. 655) affirmed.

**LONDON AND INDIA DOCKS CO. v. ATTORNEY-GENERAL**, [1909] A. C. 7 ; 78 L. J. K. B. 132 ; 99 L. T. 2 ; 16 Manson, 51—H. L.

**6. Increase of Capital—“Authorised Capital”—Capital Unissued—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 112.]**—“Registered capital” in sect. 112 of the Stamp Act, 1891, means “authorised capital.” Therefore, where a company has passed a resolution, in accordance with its articles of association, authorising the directors to increase the capital of the company by a sum not exceeding £5,000,000, and the directors have in pursuance of that authority issued new shares to the amount of £3,000,000, stamp duty is payable on the whole £5,000,000, and not only on the £3,000,000 issued.

**ATTORNEY-GENERAL v. ANGLO-ARGENTINE TRAMWAYS CO., LD.**, [1909] 1 K. B. 677 ; 78 L. J. K. B. 366 ; 100 L. T. 609 ; 25 T. L. R. 339 ; 53 Sol. Jo. 358 ; 16 Manson, 118—Channell, J.



### III. Stamp Duties—Continued.

7. *Increase of Nominal Share Capital—Unissued Capital of Company—Transfer of Undertaking of Company to another Company—Increase of Nominal Share Capital of New Company—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 113.*—There is an increase of the amount of nominal share capital of a railway company within the meaning of sect. 113 of the Stamp Act, 1891, where the company takes over the undertaking and powers of another railway company which had power to issue but has not issued a specified amount of nominal share capital upon which stamp duty under sect. 113 of the Act has already been paid.

GREAT NORTHERN, PICCADILLY, AND BROMPTON RY. CO. v. ATTORNEY-GENERAL, [1909] A. C. 1; 78 L. J. K. B. 185; 98 L. T. 731; 24 T. L. R. 506; 52 Sol. Jo. 411—H. L.

#### (d) Highway Agreements.

[No paragraphs in this vol. of the Digest.]

#### (e) Insurance Policies.

[No paragraphs in this vol. of the Digest.]

#### (f) Marketable Security.

[No paragraphs in this vol. of the Digest.]

#### (g) Mortgage.

[No paragraphs in this vol. of the Digest.]

#### (h) Proprietary Medicines.

8. *Preparation Sold as a "Brain and Nerve Food"—Preparation Held Out as a Cure for Nervous Diseases—Liability to Duty as a Medicine—Medicines Stamp Act, 1812 (52 Geo. 3. c. 150), s. 2, and schedule.*—The respondent sold a preparation known as "Antineurasthin," and described as a "brain and nerve food"; and in pamphlets published by him it was recommended as a nerve food for persons suffering from mental strain, and as a cure for nervous diseases, headaches, neuralgic pains, and other ailments. It was sold in boxes, each containing twenty-four tablets, and the usual dose was said to be three or four tablets a day, to be taken between meals. It was described by the respondent as a natural food, and most of its ingredients were articles of food. The respondent was summoned for selling a box containing the preparation to be used as a medicine without a paper cover or wrapper provided and stamped by the Commissioners of Inland Revenue, as required by sect. 2 of the Medicines Stamp Act, 1812, and the magistrate, being of opinion, on the facts proved, that the article was not a medicine within the meaning of the Act, dismissed the summons.

HELD—that the article was sold as a medicine "for the prevention, cure, or relief of disorders and complaints incident to or affecting the human body," within the meaning of the Act, and that the respondent was liable to a penalty for selling the same without having the box duly stamped; and, further, that the Court had power to review the finding of the magistrate, as he had not found as a fact that the article was not a medicine, but had merely found that on the facts proved it was not in law a medicine.

HARDING v. MIGGE, 101 L. T. 459; 73 J. P. [493—Div. Ct.]

### (i) Receipt.

9. *Stamped Composite Receipt—Contemporaneous Unstamped Receipt for One of the Sums Included in Stamped Document—Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 101, 103.*—The defendant gave a duly stamped composite receipt to a tenant of his in respect of a payment made on foot of an account for rent and goods supplied, and at the same time sent to the tenant an unstamped document, which purported to be a receipt for the rent (which exceeded £2), as a separate item.

HELD—that the latter document constituted a "receipt" within sect. 101 of the Stamp Act and required to be stamped.

ATTORNEY-GENERAL v. ROSS, [1909] 2 I. R. [246; 43 I. L. T. 148—C. A., Ireland.]

### (k) Settlement.

10. *Sale of Property Charged with Annuity—Deed of Substituted Security—Stamp Act, 1891 (54 & 55 Vict. c. 39), Sched. I.*—A., by antenuptial contract of marriage, bound himself to pay his wife, if she should survive him, an annuity of £400, the annuity being secured by A.'s personal covenant and also by a charge on certain lands. The deed was duly stamped. Subsequently A., with the consent of his wife, sold some of the lands so charged, and as new security for the annuity he conveyed certain other property to trustees.

HELD—that the deed by which the new security was substituted was not a "settlement" within the meaning of that expression in Sched. I. to the Stamp Act, 1891, and accordingly was not chargeable with settlement duty.

Decision of First Division of the Court of Session ([1909] S. C. 248; 46 Sc. L. R. 276) affirmed.

INLAND REVENUE COMMISSIONERS v. OLIVER [AND ANOTHER, [1909] A. C. 427; 78 L. J. P. C. 146; 101 L. T. 140; 25 T. L. R. 707; 53 Sol. Jo. 649—H. L.]

### (l) Miscellaneous.

[No paragraphs in this vol. of the Digest.]

## REVERSIONS AND REMAINDERS.

See PERSONAL PROPERTY; REAL PROPERTY AND CHATTELS REAL.

## REVISING BARRISTER.

See ELECTIONS.

## REVOCATION.

See WILLS.

**REWARD.**

See CONTRACTS : CRIMINAL LAW.

**RIGHT OF WAY, etc.**

See EASEMENTS ; HIGHWAYS.

**RIOT.**

See CRIMINAL LAW AND PROCEDURE.

**RIPARIAN OWNERS AND RIGHTS.**

See FISHERIES ; WATERS AND WATERCOURSES.

**RIVERS.**

See WATERS AND WATERCOURSES.

**ROADS.**

See HIGHWAYS, STREETS AND BRIDGES.

**ROBBERY.**

See CRIMINAL LAW AND PROCEDURE.

**ROYAL FORCES.**

1. *Dismissal from the Army—Action Against Army Council—Striking Out Statement of Claim*—*R. S. C. Ord. 25, r. 4.*—The statement of claim in an action against the members of the Army Council for wrongfully procuring the plaintiff's dismissal from the Army, or, alternatively, for having wrongfully coerced and intimidated him into resigning his commission, struck out on the ground that it disclosed no reasonable cause of action.

WOODS *v.* LYTTTELTON AND OTHERS, 25 T. L. R. [665—C. A.]

2. *Army Officer's Pension—Attachment—Paymaster-General's Pay Warrant—Negotiability*—*Army Act, 1881 (44 & 45 Vict. c. 58), s. 141.*—Sect. 141 of the Army Act, 1881, which renders void every charge on an army officer's pension, does not apply to money which has been collected as pension by the officer's bankers, but has lost its character of pension by being reduced into possession by such collection.

A form of receipt, signed by an officer for the amount of his pension due, having the words "This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General's office one day for examination," is not a negotiable instrument.

JONES & Co. *v.* COVENTRY, [1909] 2 K. B. 1029 ; [101 L. T. 281 ; 25 T. L. R. 736 ; 53 Sol. Jo. 734—Div. Ct.]

See S. C. under BANKERS AND BANKING, I.

3. *Volunteers, Yeomanry and Militia—Bequest—“Cesed to Exist”—Charitable Bequest—Territorial and Reserve Forces Act, 1907 (7 Edw. 7, c. 9), ss. 29, 34—Orders in Council, March 19th and April 6th, 1908.*—The effect of the Territorial and Reserve Forces Act, 1907, is not that the Volunteers, Militia and Yeomanry have ceased to exist, but that they are reorganised under different names. Therefore bequests for the benefit of Volunteer, Yeomanry, and Militia units enure for the benefit of the corresponding Territorial and Special Reserve units established under the Territorial and Reserve Forces Act, 1907, and in the case of the Territorial units must be paid over to the proper County Associations.

A bequest to the officer commanding a regiment of Militia "for the mess of that regiment, or for the poor of the regiment," is a good charitable bequest, and must be paid to the officer commanding the corresponding unit in the Special Reserve.

IN RE DONALD, MOORE *v.* SOMERSET, [1909] 2 [Ch. 410 ; 78 L. J. Ch. 761 ; 101 L. T. 377 ; 53 Sol. Jo. 673—Warrington, J.]

**SALE OF GOODS AND PERSONAL PROPERTY.**

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See also ARBITRATION, No. 1; MARKETS, No. 2; SPECIFIC PERFORMANCE, No. 2.

## I. ACCEPTANCE.

[No paragraphs in this vol. of the Digest.]

## II. CONDITIONS.

1. *Sale of Motor-car—Any Purchase of New Car to be made through Purchasers of Old Car—“Purchase” of Motor-car—Motor-car obtained under Hiring Agreement with Option of Purchase.*] The plaintiffs bought a motor-car from the defendant at a certain price on condition that if and when she bought a new car she would buy it through them. Subsequently, the defendant obtained a new car under a hiring agreement which gave her an option to purchase it in certain events.

HELD—that an action by the plaintiffs claiming damages for breach of contract, failed, inasmuch as there had been no “purchase” of a new motor-car by the defendant within the meaning of the arrangement between her and the plaintiffs.

Decision of Phillimore, J., reversed.

GRANDE MAISON D'AUTOMOBILES, L.D. v. [BERESFORD, 25 T. L. R. 522—C. A.]

## III. CONSTRUCTION.

2. *Interest in Land—Slag to be Severed and Removed by Purchaser—Breach of Contract—Defect in Vendor's Title—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 51, 62.*]—The lessee of land agreed in writing to sell to R. & Co. at a fixed price per ton as much of the slag and cinders forming part of the land in question as they liked to remove, and agreed to give them free access. His lessors interfered and barred the access.

HELD—that R. & Co. could not recover damages against the lessee for loss of their bargain, because the contract was one for the sale of an interest in land, and the lessee was only prevented from performing his part of the contract by a defect in his own title.

*Bain v. Fothergill* ((1874) L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387—H. L.) followed and applied.

MORGAN v. RUSSELL & Co., [1909] 1 K. B. [357; 78 L. J. K. B. 187; 100 L. T. 118; 25 T. L. R. 120; 53 Sol. Jo. 136—Div. Ct.]

## IV. DAMAGES.

[No paragraphs in this vol. of the Digest.]

## V. FORMATION OF CONTRACT.

[No paragraphs in this vol. of the Digest.]

## VI. MISCELLANEOUS.

3. *Delivery by Instalments—Defective Delivery of First Instalment—Repudiation of Contract—*

*Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 31, sub-s. 2.*]—In a contract for the sale of goods to be delivered in different instalments a breach by one party in connection with one instalment may be of such a kind, or take place in such circumstances, as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent instalments. In such a case the whole contract may be repudiated. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not deliver any other kind of goods in the future, the other contracting party is under no obligation to wait to see what happens; he can at once cancel the contract. In an arbitration arising out of a contract for the sale of 1,100 pieces of timber to be delivered in two instalments, the umpire found that the first instalment, consisting of 750 pieces, did not comply with the terms of the contract, and he further awarded that the said instalment was so far from complying with the requirements of the contract as to entitle the buyers to repudiate and to rescind the whole contract and to refuse to accept the second instalment. The sellers tendered the shipping documents of the second instalment.

HELD—that the umpire was entitled to draw the inference from the defective delivery of the first instalment that the second instalment would also be bad, and therefore that it could not be said that the award was bad on its face.

MILLARS' KARRI & JARRAH CO. v. WEDDEL, [TURNER & Co., 100 L. T. 128; 14 Com. Cas. 25; 11 Asp. M. C. 184—Div. Ct.]

4. *Cargo Lost at Sea—Sellers of Cargo not Paid at Time of Loss—Subsequent Payment by Buyers—Buyers Paid Amount of Insurance—Right of Sellers to Sue Ship—Right of Underwriters to Recover in Sellers' Name—Subrogation.*]—Goods were sold by merchants abroad to merchants in England in pursuance of a c.i.f. contract, and the sellers sent the shipping documents to the buyers, reserving, however, the right over them until the buyers stated whether they elected to accept the enclosed bills or to pay cash less discount. The bills of lading were taken in the name of the sellers' agents. The goods were damaged on the voyage by a collision, and on the same day the buyers wrote to the sellers' agents enclosing a cheque in payment for the goods. The buyers brought an action against the owners of the other colliding ship to recover for the damage, and the sellers were subsequently added as co-plaintiffs, on the ground that the property had never passed to the buyers, and the ship was held to blame. In the meantime the underwriters, with whom the sellers had effected a policy on the goods, paid the buyers as for a total loss. Upon the assessment of damages the judge held that, as the sellers had not suffered any damage, they were not entitled to recover anything.



## VI. Miscellaneous—Continued.

**HELD**—that the sellers were entitled to recover the amount of the loss on behalf of the underwriters.

THE CHARLOTTE, [1908] P. 206; 77 L. J. P. 132; [99 L. T. 380; 24 T. L. R. 416; 11 Asp. M. C. 87—C. A.]

## VII. NOTE OR MEMORANDUM.

**5. Railway Company's Delivery Note—Earnest—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.**—In an action by the plaintiffs for the price of goods sold and delivered, the defendants counter-claimed for damages for breach of contract. The counter-claim was based upon a contract for the sale of potatoes alleged to have been verbally made between the defendants and the plaintiffs. The defendants alleged that they sent to the plaintiffs certain bags on account of the contract, and they relied upon a railway company's delivery note signed by one of the plaintiffs in which the receipt of the bags was acknowledged, as a note or memorandum of the contract within sect. 4 of the Sale of Goods Act, 1893, and they also relied upon the sending of the bags as an earnest to bind the contract.

**HELD**—(1) that the railway company's delivery note was not a note or memorandum of the contract within sect. 4 of the Sale of Goods Act, 1893, and (2) that the bags were merely sent to facilitate performance of the contract and could not be regarded as an earnest given to bind it.

SUMNER AND LEIVESLEY v. JOHN BROWN & [Co., 25 T. L. R. 745—Hamilton, J.]

## VIII. PART PAYMENT.

[No paragraphs in this vol. of the Digest.]

## IX. PASSING OF PROPERTY IN GOODS.

[No paragraphs in this vol. of the Digest.]

## X. PASSING OF TITLE TO GOODS.

[No paragraphs in this vol. of the Digest.]

## XI. SALE OF BUSINESS.

[No paragraphs in this vol. of the Digest.]

## XII. SALE BY SAMPLE.

[No paragraphs in this vol. of the Digest.]

## XIII. STOPPAGE IN TRANSITU.

**6. Goods Purchased and Forwarded to Port for Shipment Abroad—End of Transit.**—W. & Co., commission agents, having received an order from Australia to buy certain goods on commission, made contracts with six vendors at Manchester for the purchase of the goods, and, so far as the vendors were concerned, W. & Co. were the principals. The goods were to be sold, delivered at Manchester, and the property passed on delivery to the carriers in Manchester. W. & Co. instructed the vendors to mark the goods N. X. Z. Adelaide, and forward them so marked to Liverpool to the order of the defendants, who were forwarding agents, for shipment per the ship *S.*, and on January 1st,

1908, W. & Co. advised the defendants that they had instructed the vendors to forward the goods for shipment per the ship *S.*, and directed the defendants to include all the parcels in one bill of lading deliverable to the order of W. & Co. at Adelaide. The goods were delivered on board by January 11th, and the ship sailed on the 18th. On January 15th W. & Co. became insolvent, and the vendors purported to stop the goods *in transitu*, and obtained from the defendants—under an indemnity—bills of lading making the goods deliverable to their order.

In an action by the trustee in the bankruptcy of W. & Co. to recover from the defendants the value of the goods:

**HELD**—that the transit did not end, and the vendors' right to stop *in transitu* was not determined, on the receipt of the goods by the defendants at Liverpool, and that the action could not be maintained.

KEMP v. ISMAY, IMRIE & Co., 100 L. T. 996; [14 Com. Cas. 202—Lord Alverstone, C.J.]

## XIV. WARRANTY.

**7. Breach of Implied Warranty—Death of Wife through Eating Tinned Salmon—Pecuniary Damages for Loss of Wife—Cause of Action Independent of Tort—Recovery of Damages, Based on Loss of Services.**—In an action to recover damages for the pecuniary loss sustained by the plaintiff by reason of the death of his wife through eating tinned salmon supplied and sold by the defendants to the plaintiff and his wife, the jury awarded the plaintiff, *inter alia*, £200.

**HELD**—that the rule laid down by Lord Ellenborough, C.J., in *Baker v. Bolton* (1 Camp. 493) that "In a civil court the death of a human being could not be complained of as an injury; and the damages as to the plaintiff's wife must stop with the period of her existence," was limited to actions based on the tort, which was the wrong that caused the death; but that where there was also another and independent cause of action, the loss of services caused by the death of the wife was an element which might be included in the damages awarded to the husband.

JACKSON v. WATSON AND SONS, LD., [1909] 2 [K. B. 193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454; 53 Sol. Jo. 447—C. A.]

## SALE OF LAND.

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See also CHARITIES, Nos. 1, 4; COMPULSORY PURCHASE; EXECUTORS, No. 27; LOCAL GOVERNMENT, No. 10; MORTGAGE, Nos. 4, 12; PARTITION; SALE OF GOODS, No. 2; SETTLEMENTS, Nos. 12, 13; TRUSTS, Nos. 10, 11.

## I. ABSTRACT OF TITLE.

[No paragraphs in this vol. of the Digest.]

## II. BUILDING ESTATE.

**1. Restrictive Covenants—Rights of Purchasers inter se—Vendors' Right to Dispense with Adherence to Restrictions.**—In 1860 part of an estate which had been purchased by a society was proposed to be sold in numbered lots as shown on the sale plan, which contained also the conditions of sale.

In January, 1861, the estate was vested in the trustees of the society, and an engrossment was prepared of an indenture between the persons whose names and seals were stated to be, but, as the indenture was never executed, were not, subscribed in the second schedule to the indenture and the trustees of the society. A plan was annexed to the indenture identical with that originally prepared, and conditions were scheduled to the indenture which were the same as those contained in the sale plan, except that it was stated that certain restrictive covenants which were required to be entered into were to be between each of the persons who subscribed the indenture and the others of them and separately with the trustees of the society.

Among the restrictive covenants was one that on no lot was any hotel, tavern, public-house, beerhouse, or manufactory to be built, or any house used as such, without the vendors' consent.

The trustees of the society conveyed two of the lots to predecessors in title of the defendants by deeds dated in 1861 and 1866, and other lots to predecessors in title of the plaintiffs by deeds dated in 1861. Each of the conveyances contained a covenant by the grantees to observe the restrictions contained in the indenture of January, 1861.

The lessee of one of the defendants used a building on one of the lots as an hotel.

In 1880 one of the trustees of the society was party to a conveyance whereby part of the land on which the hotel was built was conveyed to a predecessor in title of the plaintiffs other than the plaintiff E.

The conveyance contained restrictive covenants not extending to the building of an hotel.

**HELD**—that the plaintiff E. was entitled to an injunction to enforce the restrictive covenant as to the building of an hotel.

*Osborne v. Bradley* (89 L. T. R. 11; [1903] 2 Ch. 446) distinguished.

Decision of Parker, J. ([1908] 2 Ch. 374; 77 L. J. Ch. 617; 99 L. T. 346) affirmed.

*ELLISTON v. REACHER*, [1908] 2 Ch. 665; [78 L. J. Ch. 87; 99 L. T. 701—C. A.]

**2. Restrictive Covenants—No Evidence of General Building Scheme—Right of Purchasers inter se—No Reference to Prior Purchasers' Covenants—Benefit not Annexed to Land.**—In 1840 part of an estate was sold to the defendants' predecessor in title subject to restrictive covenants. In 1843 another part was sold to the plaintiffs' predecessor in title subject to the same restrictive covenants. The remainder of the estate was sold at various dates by conveyances containing building covenants, and in time the whole estate was built over as a residential quarter. The conveyance of 1843 did not refer to that of 1840, nor to any covenants therein, and there was no evidence that either the plaintiffs' or the defendants' predecessors in title were aware of any restrictive covenants in conveyances earlier than theirs or of any obligation on the vendors with regard to the rest of the estate. The plaintiffs' action was to restrain a breach of covenant in the conveyance of 1840.

**HELD**—that the plaintiffs had not shown the existence of a general building scheme with mutual obligations and benefits, and that the benefit of the restrictive covenants in the conveyance of 1840 did not pass, as annexed to the land, to the plaintiffs under the conveyance of 1843.

Decision of Joyce, J. reversed.

*REID v. BICKERSTAFF*, [1909] 2 Ch. 305; 78 L. J. Ch. 753; 100 L. T. 952—C. A.]

**3. Restrictive Conditions—No Building Scheme—Effect of Registration of Restrictive Covenants—Land Transfer Acts, 1875 (38 & 39 Vict. c. 87), s. 84; and 1897 (60 & 61 Vict. c. 65), Sched. I.**

—Where there is no building scheme in fact in respect of land, the entry on the register of restrictive conditions affecting such land under sect. 84 of the Land Transfer Act, 1875, as amended by Sched. I. to the Land Transfer Act, 1897, does not have the effect of creating a building scheme so as to entitle the purchaser of one plot of the land to enforce those restrictive conditions against the purchasers of other plots.

*WILLE v. ST. JOHN*, [1909] W. N. 229; 101 L. T. 558; 26 T. L. R. 87; 54 Sol. Jo. 65—Warrington, J.]

## III. CONDITIONS AND PARTICULARS OF SALE.

**4. Interest on Purchase-money—Delay in Completion—Objection to Title—Consequent Litigation—Local Condition of Sale—Default of Purchaser.**—The purchaser of real estate made

### III. Conditions and Particulars of Sale—*Continued.*

a requisition on the title and subsequently obtained a declaration, under the Vendor and Purchaser Act, 1874, that the vendors had not shown a good title. This decision was reversed by the Court of Appeal and by the House of Lords. By a local condition of sale, if the sale were not completed by the time appointed the purchaser was to pay 5 per cent. interest on the balance of purchase-money unpaid, unless the delay in completion arose from any cause other than the neglect and default of the purchaser, and such balance unpaid were deposited in any bank on a deposit account bearing interest. At the time for completion and before the decision of the Court of Appeal the purchaser deposited the balance of purchase-money in the Bank of England, and after the decision of the House of Lords transferred this money into Court.

**HELD**—that the vendors were entitled to the 5 per cent. interest, as the purchaser's conduct, though not unreasonable, was a breach of duty to the vendors, and the delay in completion was due to this default.

**IN RE BAYLEY-WORTHINGTON AND COHEN'S**  
[CONTRACT, [1909] 1 Ch. 648; 78 L. J. Ch.  
351; 100 L. T. 650—Parker, J.]

**5. Condition Reserving Right to Rescind if Purchaser Insists on Requisitions—Premises Described as Freehold—Incumbrance not Disclosed in Particulars—Innocent Misrepresentation.**—The applicants purchased certain premises for £300 at a sale by auction from the respondents. The premises were described in the particulars as freehold and without mention of incumbrances. The premises were in fact subject to a rentcharge of £5 7s. 9d., as might have been discovered by the respondents on any examination of their title. By the conditions of sale it was (*inter alia*) provided that each lot was sold subject to all chief rents, that the vendors might be at liberty to rescind the sale if the purchasers insisted on any objection or requisition which the vendors might be unwilling to remove or comply with; and that any incorrect statement, error, or omission should not annul the sale or entitle either the vendors or the purchasers to any compensation. The applicants insisted upon the respondents discharging the incumbrance, and thereupon the respondents claimed to rescind the sale.

**HELD**—that the respondents had acted honestly under a mistake, and not recklessly or unreasonably, and had done nothing to disentitle them to rescind.

**IN RE A CONTRACT BETWEEN SIMPSON AND OTHERS AND MOY**, 53 Sol. Jo. 376—Joyce, J.]

### IV. CONTRACT.

**6. Contract in Letters—Subject to Approval of Formal Contract—Agent—Excess of Authority.**—It is not every excess of authority by an agent that will vitiate a contract, and where such excess is not unreasonable it will not operate to prevent specific performance of the contract.

Where an agreement by letters is made "subject to" the approval of a formal contract, there is no concluded contract until such formal contract has been approved. *Secus*, where the stipulation is not conditional, but merely supplemental.

**Winn v. Bull** ((1878) 7 Ch. D. 29; 47 L. J. Ch. 139; 26 W. R. 230—Jessel, M.R.) followed.

**BROMET v. NEVILLE**, 53 Sol. Jo. 321—Eve, J.

### V. CONVEYANCE.

[No paragraphs in this vol. of the Digest.]

### VI. LEASEHOLDS.

[No paragraphs in this vol. of the Digest.]

### VII. MISCELLANEOUS.

**7. Sale under Direction of Court—Misrepresentation—Relief—Indian Contract Act, 1872, ss. 18, 19.**—In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers.

A sale by auction held under the direction of the Court was set aside at the instance of the purchaser on the ground of misrepresentation as to the subject-matter of the sale.

**MAHOMED KALA MEA v. A. V. HARPERINK**  
[AND OTHERS, 36 L. R. Ind. App. 32; 25  
T. L. R. 180—P. C.]

**8. Failure to Complete—Forfeiture of Deposit—Indemnity on Resale—Deposit taken into Account.**—The defendant agreed to purchase certain property and paid a deposit, but failed to complete. Consequently by the terms of the contract the deposit was forfeited, and the vendor was at liberty to resell, making the defendant liable for any adverse difference in price.

**HELD**—that the deposit must be taken into account in calculating any deficiency in price on a resale.

**SHUTTLEWORTH v. CLEWS**, [1909] W. N. 254  
Joyce, J.]

**9. Price—Interest on Price—Exchange of Lands—Harbour—Railway.**—In 1881 harbour trustees made an agreement with a railway company whereby each was to convey to the other for their respective undertakings certain lands, to be acquired or already acquired. By 1885 the parties were in possession of the respective lands, but owing to disagreement arising out of the terms of the agreement and from unforeseen difficulties, no conveyances had been executed and no adjustment of accounts had been made. In an action by the harbour trustees in which they claimed, *inter alia*, interest on unpaid purchase money:—

**HELD**—that the circumstances of the case disclosed nothing sufficient to take it out of the established rule that where a purchaser of land entered into possession before the purchase price was paid, interest on the price from the date at



# VII. Miscellaneous—Continued.

which he obtained full possession ran in favour of the vendor.

GREENOCK HARBOUR TRUSTEES *v.* GLASGOW  
[AND SOUTH-WESTERN RY. CO., 46 Sc. L. R.  
1011: [1909] W. N. 152—H. L. (Sc.).

# VIII. PARCELS.

10. *Compulsory Purchase of Land for Street Widening under Michael Angelo Taylor's Act* (57 Geo. 3, c. 29)—*Description by Plan only—Right of Vendor to have Dimensions Inserted in Conveyance.*—A purchaser is entitled to say by what description he wishes to have the subject-matter of a purchase vested in him, but the description must give effect to the contract entered into.

Under Michael Angelo Taylor's Act a borough council contracted to purchase from its owner a piece of land for street widening. The piece was coloured pink on a plan annexed to the notice to treat, and appeared to project into a street some ten feet beyond a proposed new line of frontage of the street indicated by a red line. There were no figures on the plan, except a scale of feet, showing any dimensions. The vendor in his claim set out the length and breadth of the piece and its area in feet and inches, and required those dimensions to be inserted in the conveyance, whereas the council only proposed to describe the piece by reference to the plan.

HELD—that the dimensions as set out by the vendor must be inserted in the conveyance.

MONIGHETTI *v.* WANDSWORTH BOROUGH  
[COUNCIL, 73 J. P. 91—Eve, J.

# IX. PARTIES.

*See SETTLEMENTS, Nos. 12, 13.*

# X. PRACTICE.

11. *Vendor's Action for Specific Performance—Title Accepted and Conveyance Approved—Form of Order.*—Comment upon the form of minutes in Seton (6th ed.), p. 2240, n. 6. It is not right to order a purchaser to pay his purchase money without providing for delivery to him of his conveyance.

COOPER *v.* MORGAN, [1909] 1 Ch. 261; 78 L. J. [Ch. 195; 99 L. T. 911—Warrington, J.

12. *Doubtful Title—Question of Construction—Vendor and Purchaser Summons—Originating Summons—Costs.*—The purchaser of freehold ground rents objected to the title, which depended on a difficult question on the construction of a will. The vendors then took out a summons under the Vendor and Purchaser Act, 1874, claiming that on the construction of the will they had shown a good title. Neville, J., suggested that the vendors ought to take out an originating summons to have the question of construction determined, and, on their refusal to do so, he held that the title was too doubtful to force upon the purchaser. The Court of Appeal having made the same suggestion, the vendors took out an originating summons to have the question of construction determined, and it was decided in their favour.

The Court then directed that the declaration made on the originating summons should be read into the order, and discharged the order of Neville, J., and declared that the vendors had shown a good title, but, as the procedure adopted by the vendors was incorrect, they were ordered to pay the costs of the appeal and in the Court below.

IN RE NICHOLS AND VAN JOEL'S CONTRACT,  
[1909] W. N. 226—C. A.

# XI. RESTRICTIVE COVENANTS.

*See also Nos. 1, 2, 3, supra.*

13. *Constructive Notice—Specific Performance—Freeholds Subject to Restrictive Covenants—Duty of Vendor to Disclose—Return of Deposit.*—Where the vendor of freehold property mentions to the purchaser that the property is subject to the same conditions as the adjoining property, the purchaser is not fixed with constructive notice of restrictive covenants, and the vendor is not entitled to specific performance.

Property described in a contract for sale as "freehold" means unincumbered freehold, and such a description does not properly describe freeholds subject to restrictive covenants.

There is an obligation on a vendor of freeholds to disclose restrictive covenants, and if he does not disclose them the purchaser is entitled to a return of his deposit.

HONE *v.* GAKSTATTER, 53 Sol. Jo. 286—Eve, J.

14. *Breach by Lessee of Purchaser—Covenant by Purchaser for Himself and Assigns—Re-entry by Covenantor—Continuing Breach.*—A. purchased a portion of the L. estate, and covenanted for himself, his executors, administrators, and assigns, that he would not build in a certain way. A. granted a building lease with a similar covenant, and the lessee committed a breach. The lessee became bankrupt, and A. re-entered into possession. The building in breach of the covenant remained unfinished.

Subsequently, the plaintiff acquired the L. estate together with the benefit of all covenants entered into by purchasers of portions of that estate. In an action by the plaintiff against A. for an injunction to restrain him from erecting buildings in breach of his covenant, and for an order directing him forthwith to pull down such buildings:

HELD—(1) that the covenant was broken once for all when the houses were built contrary to it, and that there was not a continuing breach; (2) that there was no evidence that A. had done anything calculated to encourage or promote the breach so as to render him liable for the violation of the covenant; and (3) that although the conveyance to the plaintiff gave him the benefit of A.'s covenants it did not purport to be an assignment of any right in respect of past breaches.

Judgment of Eve, J. ([1909] 1 Ch. 680; 78 L. J. Ch. 337; 100 L. T. 574; 25 T. L. R. 363; 53 Sol. Jo. 322) affirmed.

POWELL *v.* HEMSLEY, [1909] 2 Ch. 252; 78 [L. J. Ch. 741; 101 L. T. 262; 25 T. L. R. 649—C. A.

**XI. Restrictive Covenants—Continued.**

**15. Covenant not to Erect Building for the Purposes of Offensive Trade—Covenant to Fence—“Building”—“Offensive Trade”—Advertisement Hoarding.**—A purchaser of land covenanted to fence off the lots purchased by him from the road, such fence to consist of a dwarf wall with iron palisading and gates either of wood or iron. He further covenanted that “no building should be erected thereon for manufacturing purposes nor for the carrying on of any noisy, noisome, offensive, or dangerous trade or calling, nor as a public-house or retail shop, and no steam engine should be erected thereon.” By agreement with the purchaser the defendants erected along the boundary of the land a hoarding of a permanent nature and covered it with advertisements.

**HELD**—(1) that the hoarding was a breach of the covenant as to fencing; and (2) (Fletcher Moulton, L.J., dissenting) that the hoarding was a “building,” that there was carried on upon it the trade or calling of a bill-poster, and that that trade or calling was an offensive trade or calling within the covenant.

**NUSSEY v. THE PROVINCIAL BILL POSTING CO.**  
[AND EDDISON, [1909] 1 Ch. 734; 78 L. J. Ch. 539; 100 L. T. 687; 25 T. L. R. 489; 53 Sol. Jo. 418—C. A.]

**XII. TITLE**

*See* Nos. 11, 12, *supra*.

**XIII. TITLE DEEDS.**

[No paragraphs in this vol. of the Digest.]

**SALFORD HUNDRED COURT.**

*See* COURTS.

**SALMON.**

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*See* ADMIRALTY; SHIPPING AND NAVIGATION.

**SAMPLES.**

*See* FOOD AND DRUGS; SALE OF GOODS.

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*See* HIGHWAYS; METROPOLIS; PUBLIC HEALTH.

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**SATISFACTION AND DISCHARGE.**

*See* CONTRACT; JUDGMENT.

**SATISFACTION IN EQUITY.**

*See* WILLS.

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*See* BANKS AND BANKING.

**SCHOOLS AND SCHOOLMASTERS.**

*See* CHARITIES; EDUCATION.

**SCIENTER.**

*See* ANIMALS.

**SCIENTIFIC AND LITERARY SOCIETIES.**

[No paragraphs in this vol. of the Digest.]

**SCOTTISH LAW.**

*See also* WILLS, No. 1.

**1. Lease**—*Lease by Heir of Entail in Possession—Sheep Stock—Taking Over—Liability of Succeeding Heir in Entail.*—In the case of a lease of a sheep farm made by an heir of entail in possession, the obligation to purchase the sheep at the expiry of the lease is personal only to the lessor, and does not bind the next heir of entail.

Decision of Ct. of Sess. ([1908] S. C. 628; 45 Sc. L. R. 514) affirmed.

**GILLESPIE v. RIDDELL**, [1909] A. C. 130; 100 [L. T. 1; [1909] S. C. (H. L.) 3; 46 Sc. L. R. 29—H. L.]

**SEA AND SEASHORE.**

*See* WATERS AND WATERCOURSES.

**SEAMEN.**

*See* MASTER AND SERVANT; SHIPPING AND NAVIGATION

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See AGENCY ; COMPANIES ; SOLICITORS,  
No. 19 ; STOCK EXCHANGE, No. 2.

**SECURITY FOR COSTS.**

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**SEDUCTION.**

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See HUSBAND AND WIFE.

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See HUSBAND AND WIFE.

**SEQUESTRATION.**

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**SERVICE CONTRACTS.**

See INFANTS ; MASTER AND SERVANT.

**SET-OFF AND COUNTER-  
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See ACTION ; ADMIRALTY ; AGENCY ;  
BANKERS ; BANKRUPTCY ; COM-  
PANIES ; DISTRESS, No. 4 ; MASTER  
AND SERVANT, No. 105 ; MORTGAGE ;  
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**SETTLEMENT AND  
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See also MORTGAGE, No. 14 ; POWERS ;  
RENT-CHARGES, No. 1 ; REVENUE,  
No. 10 ; TRUSTS ; WILLS.

**I. GENERAL.**

1. *Gift to Illegitimate Children—Illegitimate Child en ventre sa mère — Marriage with Deceased Wife's Sister.*—A settlement was made by a mother providing for the children of a daughter who had gone through the ceremony of marriage with her deceased sister's husband.



**I. General—Continued.**

Three weeks after the settlement a child was born to the daughter.

**HELD**—that the child took under the settlement.

*In re Shaw, Robinson v. Shaw* ([1894] 2 Ch. 573; 63 L. J. Ch. 770; 71 L. T. 79; 43 W. R. 43—North, J.) overruled.

*Hill v. Crook* ((1873) L. R. 6 H. L. 265; 42 L. J. Ch. 702; 34 W. R. 137—H. L.) followed.

Decision of Joyce, J. ([1909] 1 Ch. 578; 99 L. T. 825; 52 Sol. Jo. 854) reversed.

**EBBERN v. FOWLER**, [1909] 1 Ch. 578; 78 L. J. [Ch. 497; 100 L. T. 717; 53 Sol. Jo. 356—C. A.

**2. Settled Land—Practice—Capital Money in Court—Payment out to Trustees Petition.**—Rule 2 of the Settled Land Act Rules, 1882, applies where the money in Court is capital money arising under the Act, but does not necessarily apply where the money has been paid into Court in a different action and exceeds £1,000; and in the latter case an application for payment out of Court to Settled Land Act trustees may be made by petition and not by summons in chambers.

**IN RE TORRY HILL ESTATE, PEMBERTON v. PEMBERTON**, [1909] 1 Ch. 468; 78 L. J. Ch. 373; 100 L. T. 433—Parker, J.

**3. Rule Against Double Possibilities—Equitable Estate.**—The rule against the limitation of land to an unborn child with remainder to the latter's unborn child is not limited in its application to legal limitations; it applies also to cases where the limitations are of equitable interests and the legal estate is in trustees.

Decision of Eve, J. ([1909] 2 Ch. 450; 78 L. J. Ch. 657; 101 L. T. 153; 25 T. L. R. 688; 53 Sol. Jo. 651) affirmed.

**IN RE NASH, COOK v. FREDERICK**, [1909] W. N. [209; 26 T. L. R. 57; 54 Sol. Jo. 48—C. A.

**II. CAPITAL MONEYS.****(a) Improvements.****(i.) In General.**

**4. Absence of Scheme—No Special Need—Delay—Settled Land Acts, 1882—1890.**—The equitable tenant for life of settled land, who in 1901 had been let into possession under order of the Court, directed between February, 1906, and June, 1907, a laundry, a coachman's cottage, and a new beast-house, in place of one fallen into disrepair, to be erected on the land. The tenant for life had paid for these improvements, and now applied to be repaid by the trustees out of the capital moneys liable to be invested in land. No explanation was given of the special need for the laundry or cottage, nor any evidence as to why the beast-house had been allowed to fall into disrepair. No scheme had been submitted to the trustees.

**HELD**—that, as there had been so long delay and no scheme had been submitted, no order could be made.

**IN RE ALLEN'S SETTLED ESTATE**, 126 L. T. Jo. [282—Eady, J.

**(ii.) "Additions and Alterations Readably Necessary."**

[No paragraphs in this vol. of the Digest.]

**(iii.) Re-building Mansion House.**

[No paragraphs in this vol. of the Digest.]

**(b) Investment.**

See TRUSTS, VII.

**III. COMPOUND SETTLEMENTS.**

[No paragraphs in this vol. of the Digest.]

**IV. CONSTRUCTION AND OPERATION.**

See No. 8, *infra*.

**(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Estate Clause.**

[No paragraphs in this vol. of the Digest.]

**(c) Words of Limitation.**

[No paragraphs in this vol. of the Digest.]

**V. FORFEITURE.**

See No. 10, *infra*.

**VI. HEIRLOOMS.****5. Chattels to go with Mansion-house—Vesting**

**—First Tenant in Tail or in Possession.**—

By a settlement certain chattels and effects were directed to be held upon trust so far as the rules of law and equity would allow to permit the same to be used, held, and enjoyed by the person or persons who for the time being should be entitled to the mansion-house, yet so that for the effect of transmission they should not vest absolutely in any person thereby made tenant in tail male or in tail by purchase who should not attain the age of twenty-one years, but who, nevertheless, should be entitled to the use and benefit thereof during minority.

**HELD**—that there was a sufficient indication of intention on the part of the settlor that the chattels should only vest in a tenant in tail in possession, and, therefore, that they did not vest in a first tenant in tail who, after attaining twenty-one, predeceased the settlor, the tenant for life, and had consequently never been in a position to have their use and enjoyment.

Decision of Eve, J. (25 T. L. R. 213; 53 Sol. Jo. 197) reversed.

**IN RE LORD CHESHAM'S SETTLEMENT**, [VALENTIA (VISCOUNT) v. CHESHAM (LADY)], [1909] 2 Ch. 329; 78 L. J. Ch. 692; 101 L. T. 9; 25 T. L. R. 657—C. A.

**VII. MARRIAGE SETTLEMENTS.****(a) General.**

[No paragraphs in this vol. of the Digest.]

**(b) Covenant to Settle After-acquired Property.**

See also MISTAKE, No. 4.

**6. Property by Lex Loci Incapable of being Transferred—Land in Jersey.**—A covenant to

## VII. Marriage Settlements—Continued.

settle after-acquired property does not extend to real property, which according to the *lex loci*—*e.g.*, in Jersey—is not capable of being transferred except for adequate pecuniary consideration.

*In re Dunsany's Settlement* ([1906] 1 Ch. 578; 75 L. J. Ch. 356; 94 L. T. 361—C. A.) applied.

*IN RE PEARSE'S SETTLEMENT, PEARSE v. [PEARSE]*, [1909] 1 Ch. 304; 78 L. J. Ch. 73; 100 L. T. 48; 53 Sol. Jo. 82—Eve, J.

**7. Gifts from Husband to Wife.**—There is no general rule of construction that covenants in marriage settlements to settle after-acquired property do not cover gifts by the husband to the wife.

*IN RE ELLIS'S SETTLEMENT, ELLIS v. ELLIS*, [1909] 1 Ch. 618; 78 L. J. Ch. 375; 100 L. T. 511—Eady, J.

### (c) Illegal Consideration.

[No paragraphs in this vol. of the Digest.]

### (d) Interpretation.

[No paragraphs in this vol. of the Digest.]

### (e) Power of Appointment.

See also POWERS.

**8. Portions for Younger Children—Period of Vesting—Period of Distribution—Acceleration—Gift over on Becoming Eldest Son—Younger Son Becoming Eldest Son after Payment—Power of Appointment—Delegation—Provision for Acceleration by Dower of Power.**—C. S., by her father's will, was empowered to charge lands, settled in tail male, by a marriage settlement with a sum of £6,000 for her younger children, payable in such shares and proportions and at such time as she should direct. By her marriage settlement she directed the trustees to raise the sum and to hold the same subject to appointment by her husband, or in default by herself, and in default to divide the sum among her children other than her eldest son, equally, the shares to vest, in the case of sons, at twenty-one, of daughters at twenty-one or marriage, the payment to be postponed until after the death of the survivor of the husband and wife unless they or the survivor should signify a desire that the same should be sooner raised. It was provided that if any one or more of such younger children, being a son, should become an eldest son, the original or accrued share of such son should accrue to the other younger children, unless the contrary were directed by her husband. There were three children of the marriage, who all attained twenty-one. The husband purported to appoint to the two younger children, and survived the wife. By an indenture of mortgage, to which the trustees of the settlement were parties, the husband signified the desire that the £3,000 should be raised in favour of W., the second son, and W. mortgaged the sum of £3,000. J., the eldest son, died in 1900. The husband died in 1905. W. succeeded to the estate, and died in 1907.

HELD—that the marriage settlement could not give a power to the husband to appoint the

portions, and that the settlement could not be at the same time the instrument containing the power of appointment to the children and the instrument exercising the power; that the power of appointment which the marriage settlement purported to give to the husband was obviously bad, and it was neither in form nor in substance an execution of the power given to the wife by her father's will; that the will was in no sense executory, and the settlement so far as it purported to vary the rights of the younger children was void.

Decision of Neville, J. ([1909] 1 Ch. 534; 78 L. J. Ch. 289; 100 L. T. 360; 53 Sol. Jo. 268) reversed.

*IN RE STAWELL'S TRUSTS, POOLE v. RIVERS-DALE*, [1909] 2 Ch. 239; 78 L. J. Ch. 677; 101 L. T. 49; 53 Sol. Jo. 542—C. A.

## VIII. TENANT FOR LIFE.

See also TRUSTS, No. 7.

### (a) General.

**9. Practice—Possession by Tenant for Life—Conditions—Form of Order—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 2.**—The words “and also to produce every or any such policy, receipt, or muniment to the said trustees or trustee” were omitted in error from the form of judgment in *In re Money Kyrie's Settlement* ([1909] 2 Ch. 839, 845; 69 L. J. Ch. 780), which is given in “Seton's Judgments and Orders,” 6th ed., vol. 2, p. 1758, clause (f). They should have been inserted as in the corresponding clause of the following form in “Seton,” viz., that in *In re Wythes* ([1893] 2 Ch. 369, 376; 62 L. J. Ch. 663).

*IN RE PADDON, STAINCLIFFE v. ADLAM*, [1909] [W. N. 162—Warrington, J.

**10. Residence at Mansion-House—Refusing or Neglecting to Reside—Absence on Naval or Military Service—Settled Land Act, 1882 (45 & 46 Vict. c. 38).**—Absence on naval or military service was held not to be “refusing or neglecting to reside” at a mansion-house within the meaning of the terms in a settlement.

*IN RE ADAIR*, [1909] 1 I. R. 311—Wylie, J.

### (b) Persons having Powers of Tenant for Life.

**11. Trust for Sale and Conversion—Subject to Consent of Tenant for Life—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63.**—A testator devised and bequeathed all his real and personal estate to trustees upon trust for sale and conversion, but as to real estate only at the special request or with the consent in writing of his wife, D. J. W., who was one of the trustees and entitled for life to the income of the whole estate subject to a small annuity.

HELD—that the fact that the consent of the tenant for life was necessary did not prevent the trust being a trust for sale within the meaning of sect. 63 of the Settled Land Act, 1882, and did not make it a mere power of sale.

*IN RE WAGSTAFF'S SETTLED ESTATES*, [1909] [2 Ch. 201; 78 L. J. Ch. 513; 100 L. T. 955—Neville, J.

## VIII. Tenant for Life—(Continued).

## (c) Powers.

## (i.) General.

[No paragraphs in this vol. of the Digest.]

## (ii.) Leasing.

[No paragraphs in this vol. of the Digest.]

## (iii.) Sale.

12. *Trust for Sale that may never Arise—Leave of Court not Necessary—Settled Land Act, 1884* (47 & 48 Vict. c. 18), s. 7—*Settled Land Act, 1882* (45 & 46 Vict. c. 38), ss. 58 (1) (ix.), 63.]—An intending husband conveyed land in Ireland to trustees upon trust at his request in writing during his life and afterwards at their discretion to sell the land and hold the proceeds, as well as the rents and profits of any unsold land, upon the trusts declared in his marriage settlement of even date. The latter provided that the husband should have power to direct that the lands should not be sold, in which case the trust for sale in the conveyance should not be exercised.

The husband proceeded to sell part of the lands under the Irish Land Acts without written request to the trustees, who took no part in the proceedings for sale. The question was raised whether, having regard to the trust for sale, the husband could sell without leave of the Court under sect. 7 of the Settled Land Act, 1884.

HELD—that the trust for sale was one that might never arise and was not “a trust or direction for sale” within the meaning of sect. 63 of the Settled Land Act, 1882.

*In re Horne's Settled Estate* ((1888) 39 Ch. D. 84; 57 L. J. Ch. 790) followed.

IN RE GOODALL'S SETTLEMENT, *FANE v. [GOODALL, [1909] 1 Ch. 440; 78 L. J. Ch. 241; 100 L. T. 223—Eady, J.*

13. *Settled Land—Purchase-money Paid to Prior Incumbrancers by Direction of Tenant for Life—No Discharge by Trustees of the Settlement—Settled Land Act, 1882* (45 & 46 Vict. c. 38), ss. 21, 22.]—On a sale by a tenant for life under the Settled Land Acts, where all the purchase-money is paid to incumbrancers claiming in priority to the settlement, it is necessary for the trustees of the settlement to concur in the conveyance to the purchaser to give a proper discharge for the purchase-money. The discharge of the tenant for life and the prior incumbrancers is not sufficient under sect. 22 of the Settled Land Act, 1882.

IN RE NORTON AND LAS CASAS'S CONTRACT. [1909] 2 Ch. 59; 78 L. J. Ch. 489; 100 L. T. 881—Neville, J.

## (d) Remainderman and Tenant for Life.

14. *Surrender of Lease—Consideration for Acceptance—Settled Land Act, 1882* (45 & 46 Vict. c. 38), ss. 6, 13, 53.]—Under sect. 53 of the Settled Land Act, 1882, a tenant for life exercising powers under that Act is in a fiduciary position, and if he receives a consideration for accepting the surrender of a lease a Court of equity will see that such consideration is fairly

distributed between the tenant for life and the remainderman. Where the tenant for life has been paid a considerable sum for accepting a surrender, and it will be difficult to let the property again on as advantageous terms as before, the remaindermen must be recouped for the disadvantage to them incurred by the acceptance of the surrender. The money must be paid by proper instalments to the tenant for life or other persons successively entitled for the time being.

*In re Hunloke's Settled Estates, FIDLEY v. Hunloke* ([1902] 1 Ch. 941; 71 L. J. Ch. 530; 86 L. T. 829—Eady, J.) distinguished.

IN RE DE RODES, *SANDERS v. HOBSON, [1909] 1 Ch. 815; 78 L. J. Ch. 434; 100 L. T. 959—Parker, J.*

## (e) Rights and Duties.

[No paragraphs in this vol. of the Digest.]

## IX. TRUSTEES.

[No paragraphs in this vol. of the Digest.]

## X. VOLUNTARY SETTLEMENTS.

15. *Consideration of Natural Love and Affection—Omission in Habendum of Words “to the Use” of the Grantee—Meritorious Consideration.*]—In 1870 the vendor's father, who was then seized in fee-simple, conveyed the lands sold to the vendor by a voluntary settlement. The settlement recited the settlor's desire to provide for his son, and in consideration of natural love and affection granted the lands to the vendor, his heirs and assigns, to hold unto the vendor, his heirs and assigns, omitting the words “to the use of” the vendor, his heirs and assigns.

HELD—that the lands were conveyed to the vendor beneficially in fee-simple, without any resulting use or trust for the settlor, as a use in favour of the vendor was raised by the meritorious consideration arising from the settlor's intention to provide for his son.

*Ellis v. Nimmo* ((1835) L. & G. temp. Sugd. 333) followed.

IN RE LUBY'S ESTATE, 43 L. L. T. 141—Wylie, J., [Ireland.

## SEVERAL FISHERY.

See FISHERIES.

## SEWERS AND DRAINS.

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**IV. LAND DRAINAGE . . . . . 558**

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*And see* HIGHWAYS (PRIVATE STREET WORKS); LOCAL GOVERNMENT, Nos. 4, 6; METROPOLIS, No. 8; NUISANCE, No. 1; PUBLIC HEALTH; RATES, No. 1; WATER AND WATER-COURSES, Nos. 4, 5, 6, 9.**I. "DRAIN" OR "SEWER."***See also* No. 2, *infra*.

1. *New Sewer Constructed but not in Use—Vesting in Local Authority—Deposited Plans Approved—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 16, 150, 157.*—The owner of a building estate deposited plans in accordance with the bye-laws of a local authority, made under sect. 157 of the Public Health Act, 1875, showing the course of an intended new sewer to be constructed of nine-inch pipes along a certain new road. After the plans were approved, the line of pipes or sewer was constructed under the inspection of the local authority, and when completed was passed and authorised to be covered in. No houses were built on the land fronting the new sewer, and it was not in use.

**HELD**—that the line of pipes, immediately after it was approved and authorised to be covered in, was a sewer which vested in the local authority under sect. 13 of the Act, and that they had power under sect. 16 to connect it with their other sewers.

**TURNER v. HANDSWORTH URBAN DISTRICT COUNCIL**, [1909] 1 Ch. 381; 78 L. J. Ch. 202; 100 L. T. 194; 73 J. P. 95; 7 L. G. R. 255—Neville, J.

**II. "SINGLE PRIVATE DRAIN."**

2. *Pipe Draining Houses of More than One Owner—Drainage Passing through Sewer and thence into Pipe—Whether Single Private Drain—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 19.*—A row of houses, of which six belonged to the respondent and the remainder to other owners, were drained by a system of pipes arranged as follows: The houses were drained in pairs; each house of a pair was drained by a separate pipe which discharged into a pipe common to both houses, and each common pipe discharged into a line of pipes laid in private ground behind the houses, which conveyed the drainage to a public sewer. It was admitted by the appellants that the common pipes through which the drainage of the respondent's houses passed were sewers within the meaning of the Public Health Act, 1875.

**HELD**—that the respondent's houses were not connected with the public sewer by a single private drain within the meaning of sect. 19 of the Public Health Acts Amendment Act, 1890, and that, therefore, the respondent was not

liable under that section and sect. 41 of the Public Health Act, 1875, to contribute to the expense of repairing the line of pipes behind the houses.

*Per Curiam*: On the facts stated in the special case, it was not shown that the line of pipes in question was a "single private drain."

*Per Lord Atkinson* (the Lord Chancellor and Lord Macnaghten assenting): Sect. 19 of the Act of 1890 deals only with a pipe (from houses owned by different persons) to which sect. 23 or sect. 25 of the Act of 1875 applies, or which would have come within the purview of sect. 41 of the Act of 1875 but for the statutory definition of "drain" and "sewer."

*Per Lord Atkinson* (the Lord Chancellor and Lord Macnaghten apparently assenting, but Lord Ashbourne dissenting): A house may be "connected with" a public sewer by a single private drain, although its sewage passes through a short length of "sewer" before entering such single private drain.

Decision of C. A. ([1907] 1 K. B. 182; 76 L. J. K. B. 173; 71 J. P. 89; 96 L. T. 176; 23 T. L. R. 126; 5 L. G. R. 322) affirmed.

**WOOD GREEN URBAN DISTRICT COUNCIL v. JOSEPH**, [1908] A. C. 419; 77 L. J. K. B. 924; 99 L. T. 733; 72 J. P. 393; 24 T. L. R. 850; 52 Sol. Jo. 726; 6 L. G. R. 980—H. L.

3. *Notice to do Works—Works Executed by Local Authority—Apportionment of Expenses—Recovery—Dismissal of Complaint—Right of Appeal to Quarter Sessions—Invalid Notice—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 41—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), ss. 7, 19.*—A drain, which received the drainage of several houses, being in bad condition, the local authority served notices under sect. 19 of the Public Health Acts Amendment Act, 1890, and sect. 41 of the Public Health Act, 1875, upon the owners of the houses, requiring each owner within seven days to do the whole of the work necessary to remedy the defects in the drain. The local authority subsequently executed the work themselves and apportioned the expenses so incurred among the owners. Upon one of the owners refusing to pay the sum apportioned to him, the local authority took proceedings before a Court of summary jurisdiction to recover the same. The Court dismissed the complaint of the local authority.

**HELD**—that under sect. 7 of the Public Health Acts Amendment Act, 1890, the local authority had a right of appeal against the order of the Court of summary jurisdiction to quarter sessions.

But **HELD**, that the appeal must be dismissed on the ground that the notice was an unreasonable notice.

**HORNSEY CORPORATION v. KERSHAW**, 73 J. P. [335—Middlesex Qr. Sess.]

**III. RIGHTS AND DUTIES.****(a) General.**

4. *Facilities for Carrying off Liquids from Factories—Insufficiency of Sewage Disposal Works*

**III. Rights and Duties—Continued.**

*for Treatment of Sewage—"Sewers"—Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 7.*—By sect. 7 of the Rivers Pollution Prevention Act, 1876, "every sanitary authority or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry liquids proceeding from their factories or manufacturing processes into such sewers . . . provided also that no sanitary authority shall be required to give such facilities where 'the sewers' of the authority are only sufficient for the requirements of their district. . . ."

**HELD**—that the words "the sewers of such authority," in the section cited above, meant the whole sewage system and not merely the sewage-pipes, and accordingly, as the respondents' sewage system was not sufficient to deal with the liquids from the appellants' factory as well as the sewage, the appellants were not entitled to an order requiring the respondents to give facilities for the carrying of the liquid refuse from the appellants' manufactory into the respondents' sewers.

Decision of C. A. ([1908] 2 K. B. 780; 77 L. J. K. B. 1079; 99 L. T. 641; 72 J. P. 409; 24 T. L. R. 809; 6 L. G. R. 997) affirmed.

**JONAS BROOK AND BROS., LD. v. MELTHAM**  
[URBAN DISTRICT COUNCIL, [1909] A. C. 438; 78 L. J. K. B. 719; 100 L. T. 818; 73 J. P. 353; 25 T. L. R. 582; 53 Sol. Jo. 541; 7 L. G. R. 770—H. L.]

**5. Sewage Arising Outside District—Connection by Sanitary Authority—Subsequent Right to Impose Terms—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 21, 22.**—When once a local authority has agreed with the owner of premises outside their district and connected the drains of those premises with their sewer, the owner's position is similar to that of an owner inside the district under sect. 21 of the Public Health Act, 1875, and the connection cannot be interfered with. Sect. 22 of the Act, which empowers an outside owner to have his drains connected with the local authority's sewer subject to terms to be agreed or settled as therein provided, no longer applies where an outside owner is desirous of leaving an existing connection as it is. Slight internal alterations of the owner's drains do not constitute a fresh communication within sect. 22.

Decision of Eady, J. ([1909] W. N. 189; 101 L. T. 199; 73 J. P. 427; 26 T. L. R. 2) affirmed.

**EAST BARNET VALLEY URBAN DISTRICT**  
[COUNCIL v. STALLARD, [1909] 2 Ch. 555; 101 L. T. 642; 26 T. L. R. 22; 54 Sol. Jo. 30—C. A.]

**(b) Cesspools.**

[No paragraphs in this vol. of the Digest.]

**(c) Drainage and Sewerage.**

**6. Expenses of Constructing New Sewer in Street—Liability of Frontager—Rochdale Improvement Act, 1872—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.**—By a local Act of 1872 the boundaries of Rochdale were extended,

and a certain street upon which the property of the defendant abutted was included within the boundary of the town. By sect. 171 of the local Act it was provided that "where the corporation should cause any new sewer to be constructed in any street in which there was not a sewer, or in which the existing sewer was insufficient, they may charge the owners of the lands abutting upon such street with the payment of the expenses incurred in the construction of the same. . . ." The corporation laid a new sewer in the street, and apportioned the expenses upon the frontagers.

**HELD**—that on the true construction of the private Act the defendant was liable to pay his share towards the expenses of the new sewer, the right of the corporation to levy contributions not being confined to new streets.

Decision of Lord Alverstone, C.J., reversed.

**ROCHDALE CORPORATION v. LEACH**, 54 Sol. Jo. [134—C. A.]

**(d) Nuisances.**

[No paragraphs in this vol. of the Digest.]

**(e) Vesting in Local Authority.**

See No. 1, *supra*.

**IV. LAND DRAINAGE.**

[No paragraphs in this vol. of the Digest.]

**SHANGHAI.**

See DEPENDENCIES AND COLONIES.

**SHARES.**

See COMPANIES.

**SHEEP DIPPING.**

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**SHEEP SCAB.**

See ANIMALS.

**SHERIFFS AND BAILIFFS.**

See also BANKRUPTCY; COUNTY COURTS; DISTRESS; EXECUTION; INTERPLEADER; METROPOLIS; PRACTICE AND PROCEDURE; PUBLIC AUTHORITIES.

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See also ADMIRALTY: CARRIERS, No. 2;  
DEPENDENCIES, Nos. 18, 19, 34;  
INSURANCE, Nos. 13 to 19.

## I. OWNERSHIP AND CONTROL OF SHIP.

### (a) Action of Restraint.

[No paragraphs in this vol. of the Digest.]

### (b) Liability for Disbursements.

1. *Necessaries—Master's Lien—Evidence by Affidavit—Short Cause Rules, 1908.*—A master drew bills on his owners in favour of coal merchants who had supplied coals to the ship he commanded. The bills were accepted, but were dishonoured on presentation, and the coal merchants then sued the master as the drawer of the bills.

The coal merchants issued a writ *in personam* in the Admiralty Division against the master, and on a summons for directions it was ordered that the cause should be set down for trial as a short cause, and that evidence might be given by affidavit.

HELD—that the master was liable, but that he had a lien against his ship for his disbursements.

Observations as to the advantages of the Short Cause Rules, 1908.

THE CAIRO; WATSON AND PARKER v. GREGORY, [1908] W. N. 328; 99 L. T. 940; 11 Asp. M. C. 161—Barnes, Pres.

2. *Necessaries Supplied on Credit of Ship—Claim of Defendants as Purchasers of Ship—Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 5.*—The registered owners of a certain vessel were trustees for the defendants, who had bought her from B. and had paid to him nearly the whole of the purchase-money before the necessities, subsequently referred to, were supplied. B.'s interest was limited to a small balance of purchase-money and was subject to the obligation of delivery of the ship to the defendants according to his contract.

The plaintiffs supplied to B. necessities on the credit of the ship. In an action *in rem* against the ship, in which the defendants intervened:—

HELD—that the plaintiffs were entitled to recover, their claim against the ship being paramount to that of the defendants for delivery thereof under their contract with B.

FOONG TAI & Co. v. BUCHHEISTER & Co., [1908] [A. C. 458; 78 L. J. P. C. 31; 99 L. T. 526; 11 Asp. M. C. 122—P. C.

### (c) Mortgage.

See also DEPENDENCIES, No. 18.

3. *Mortgagee Taking Possession—Coal Previously supplied to Mortgagees for Voyage on which Freight Earned—Right of Vendor of Coal to Payment out of Freight.*—The respondents sold in this country coal to the owners of the *Argentino* for a voyage to Montevideo and back,

payment to be at thirty days. Subsequently the appellants, as mortgagees, took constructive possession of the *Argentino*. By an order of Court the freight of the *Argentino* was ordered to be collected, the necessary disbursements paid, and the balance brought into Court. The respondents not having been paid for the coal supplied, claimed to be entitled to payment out of the freight which had been earned on the voyage to Montevideo and back.

HELD—that although the coal was used for the purpose of earning freight on that voyage, it was supplied to the mortgagors, and not to the appellants, and therefore that the respondents were not entitled to payment out of the freight, which must be paid to the appellants as mortgagees.

EL ARGENTINO, [1909] P. 236; 78 L. J. P. 102; [101 L. T. 80; 25 T. L. R. 518—Bigham, Pres.

4. *Trust—Transfer by Beneficial Owners to Trustee for Particular Purpose—Mortgage by Trustee for Unauthorised Purpose—Form of Mortgage Signed in Blank—Advance by Mortgagee Without Notice—Conflicting Equities—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 24, 31, 56, 57.*—The plaintiffs, who were the owners of certain shares in a ship, transferred them into the name of W. H., the senior partner of H. Brothers, who managed the line to which the particular ship belonged. W. H. was to hold the shares as trustee for the plaintiffs, the object of the transfer being to facilitate the formation of a company which it was proposed should take over the line of ships and the business of H. Brothers; and on the formation of that company W. H. was to transfer the shares to it. Upon the transfer of the shares to W. H. he was registered in respect of them under the Merchant Shipping Act, 1894, as the legal owner thereof, and he continued on the register for a number of years, during which time various attempts were made, but unsuccessfully, to form the proposed company. While W. H. was also registered, his son, who had charge of the financial arrangements of H. Brothers, improperly arranged for a mortgage of the shares in question to the defendant, and he got W. H. to execute a form of mortgage in blank, which was then handed to the defendant's agent, by whom the document was subsequently filled up, as a mortgage of the shares to the defendant. The money advanced was used in the business of H. Brothers. Neither the defendant nor his agent had any knowledge that W. H. was merely a trustee of the shares for the plaintiffs; they *bona fide* believed that he was the beneficial owner. The defendant then registered his mortgage. Upon learning what had been done by W. H., the plaintiff claimed as against the defendant a declaration that the mortgage was void, and an order that the register should be rectified by the expunging of the entry of the mortgage.

HELD (1)—that as the defendant's agent took the document which purported to be a mortgage when it was in blank, save for the signatures of W. H. and a witness, it was a mere nullity; (2) that by merely allowing W. H. to appear on the register in respect of the shares, the plaintiffs

**I. Ownership and Control of Ship—Continued.**

did not hold him out as their agent; and (3) that W. H. could not, without following the statutory provisions of the Merchant Shipping Act, 1894—i.e., by bill of sale—create a charge upon the shares; and (4) that there was no equity entitling the defendant as against the plaintiff to a charge of the shares as security for the money advanced by him.

*Rimmer v. Webster* ([1902] 2 Ch. 163; 71 L. J. Ch. 561; 86 L. T. 491; 50 W. R. 517; 18 T. L. R. 548—Farwell, J.) discussed.

Decision of Bigham, J. (24 T. L. R. 267) reversed.

*BURGESS AND OTHERS v. CONSTANTINE*, [1908] 2 [K. B. 484; 77 L. J. K. B. 1045; 99 L. T. 490; 24 T. L. R. 682; 13 Com. Cas. 299; 11 Asp. M. C. 130—C. A.

**(d) Sale.**

[No paragraphs in this vol. of the Digest.]

**(e) Ownership.**

**5. Possession—Sale—Claim to Proceeds in Court—Evidence—Claimant Contributing Originally Part of Price—Resulting Trust.**—A. and the administratrix of B. claimed a yacht, of which B. had been the registered owner. In an action commenced by the administratrix the yacht was sold by consent and the purchase-money paid into Court. The Registrar reported that the yacht had been purchased originally for £1,050, of which A. found £500, but that there was no satisfactory evidence that A. was to become part owner.

**HELD**—that this raised a presumption in favour of A. which had not been rebutted by any evidence, and that there was a resulting trust in favour of A., who was entitled to  $\frac{500}{1050}$ ths of the money in Court.

*Dyer v. Dyer* (1788) 2 Cox, 92—Eyre, C. B. applied.

*THE VENTURE*, [1908] P. 218; 77 L. J. P. 105; [99 L. T. 385; 11 Asp. M. C. 93—C. A.

**II. SEAMEN.**

See also MASTER AND SERVANT.

**(a) Wages.**

**6. Deductions from Wages—Agreement—Stipulation Contrary to Law—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 113, 114, 221, 226.**—An agreement between the master of a British ship and the crew contained the following stipulation:—"The said master shall be entitled to deduct from the wages of any member of the said crew the following amounts, viz.: for not joining at the time specified in column 11, two days' pay, or at his option any expenses which have been properly incurred in hiring a substitute; and for absence at any time without leave from his ship or from his duty, a sum equal to two days' pay for any period of absence not exceeding 24 hours, and a further sum equal to four days' pay for each succeeding completed or uncompleted period of 24 hours' absence."

**HELD**—that the above-quoted stipulation was inconsistent with the provisions of sect. 221, clause (b), of the Merchant Shipping Act, 1894, and was contrary to law.

*MERCANTILE STEAMSHIP CO., LD. AND DALE v. [HALL]*, [1909] 2 K. B. 423; 78 L. J. K. B. 812; 100 L. T. 885; 25 T. L. R. 623; 53 Sol. Jo. 562; 14 Com. Cas. 208—Pickford, J.

On Appeal—appeal withdrawn by consent (see [1909] W. N. 232).

**(b) Bonus.**

[No paragraphs in this vol. of the Digest.]

**(c) Effect of Carrying Contraband.**

[No paragraphs in this vol. of the Digest.]

**(d) Miscellaneous.**

**7. Workmen's Compensation—Industrial Disease—Disease Contracted on Board Ship—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), ss. 7, 8.**—The Workmen's Compensation Act, 1906, does not apply to the case of a seaman who contracts an industrial disease while serving on board his ship.

*CURTIS v. BLACK & CO.*, [1909] 2 K. B. 529; [78 L. J. K. B. 1022; 100 L. T. 977; 25 T. L. R. 621; 53 Sol. Jo. 576—C. A.

**(e) Termination of Service.**

[No paragraphs in this vol. of the Digest.]

**III. HIRE OF SHIP.****(a) Detention of Ship.**

**8. Charter-party—Bills of Lading—"Customs Formalities and Detentions at New York to be at the Risk and Expense of Consignee of Goods"—Customs Examination—Detention of Ship—Wharfage Expenses—Liability of Consignee—Neglect of Ship's Agents to Enforce Claim against Consignees.**—A ship was, in accordance with the charter-party, consigned to agents at New York nominated by the charterers. The ship was to discharge her cargo as fast as she could put out and according to the custom of the port. The bills of lading, as provided for in the charter-party, contained the following clause: "Customs formalities and detentions at New York to be at the risk and expense of consignee of goods." The ship was not discharged as fast as she put out to the extent of five days, owing to compliance with customs formalities. The agents took no steps to enforce against the consignees any claim for expenses, charges, demurrage, or detention caused by compliance with customs formalities. The charterers assumed full responsibility for the acts of the agents.

**HELD**—that the above clause in the bills of lading meant that any payments made in order to comply with the Customs House formalities and any time taken up in complying with those formalities were to be paid by the consignees of the goods in relief of the shipowners, and, therefore, the consignees will be liable for damages for the detention of the ship, and for the expenses caused by compliance with customs formalities.



### III. Hire of Ship—Continued.

HELD FURTHER—that the shipowners had not by the charter-party barred themselves from exercising as against the consignees such rights as the bills of lading gave to them.

CORBRIDGE STEAMSHIP CO., LD. v. BUCKNALL  
[STEAMSHIP LINES, LD., 14 Com. Cas. 141—  
Channell, J.]

#### (b) Exceptions in Charter-party.

9. *Bill of Lading Signed by Time Charterer on Behalf of Shipowner—Construction—“Inaccessible on Account of Ice” “Any Other Cause” “Error in Judgment” of Master.*—A time charter contained the following clause: “(12) The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents, or in otherwise complying with the same, and the owners shall be responsible for the full, true and proper delivery of the cargo. The stevedore shall be employed and paid by the charterers, but this shall not relieve the owners from responsibility as to proper stowage, which must be controlled by the captain, who shall keep a strict account of all cargo loaded and discharged as usual.”

The time charterers signed a bill of lading “for the captain and owners,” and it contained the following conditions and exceptions: “(2) Error in judgment, negligence or default of . . . master . . . or other persons in the service of the ship, whether in navigating the ship or otherwise”; “(4) Should a port be inaccessible on account of ice, blockade or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees or owners of the goods; and upon such discharge the ship’s responsibility shall cease.”

HELD—(1) that the signature of the time charterers to the bill of lading bound the shipowners just as if the master had signed it by direction of the charterers; (2) that “inaccessible” meant inaccessible within a reasonable time after the ship arrived; (3) that the words “error in judgment of the master” did not include his mistake as to the construction of the bill of lading; and (4) that the words “or other cause” must be construed in accordance with the *ejusdem generis* rule, and did not include ice.

Decision of C. A. ([1908] 2 K. B. 385; 77 L. J. K. B. 778; 24 T. L. R. 454; 13 Com. Cas. 244).

S.S. KNUTSFORD, LD. v. TILLMANNS & CO.  
[1908] A. C. 406; 77 L. J. K. B. 977; 99 L. T. 399; 24 T. L. R. 786; 13 Com. Cas. 334; 11 Asp. M. C. 105—H. L.

10. “Obstruction”—Cargo Delayed by Strike on Railway—Strike Occurring before Arrival of Ship

—[*Delay Caused by Obstruction in Docks—Congestion of Shipping.*]—By a charter-party, cargo was to be loaded on the plaintiffs’ ship at the rate of 200 tons per running day, and time for loading was to commence to count 12 hours after written notice given by the master on working days between 9 a.m. and 6 p.m. of the ship’s readiness to receive cargo, and all time on demurrage over and above the lay days to be paid for at a certain rate; and if the cargo could not be loaded by reason of riots or any dispute between masters and men, occasioning a strike of railway employes or other labour connected with the working, loading, or delivery of the cargo, or through obstructions on the railways or in the docks or other loading places beyond the control of the charterers, the time lost was not to be counted as part of the lay days. The ship arrived at the port of loading (Bahia Blanca) on February 24th, 1905, and her master gave notice of readiness to load at 5.30 p.m. on that day. At the time the port was crowded with vessels, the congestion having arisen from a strike among railway employes which had occurred in the previous month and a military insurrection which had occurred earlier in February, during which the insurgents laid hands on the railway. Both the strike and the insurrection were over before the plaintiffs’ ship arrived. The cargo intended for the ship was delayed through the above causes. The ship did not reach the berth and begin to load until March 30th. In an action against the charterers for demurrage:—

HELD—that, as the cargo was delayed on the railway by reason of the strike and so prevented from being loaded, the charterers were protected by the strike clause.

*Semble*, the cargo was prevented from being loaded by an “obstruction” beyond the control of the charterers, owing to the ship not being able to get to her berth by reason of the other vessels being before her in turn to load.

*Semble*, also, that, subject to the above, the lay days would have commenced to run at 5.30 a.m. on February 25th.

Decision of Bigham, J. (24 T. L. R. 280; 13 Com. Cas. 161) affirmed.

LEONIS STEAMSHIP CO. v. JOSEPH RANK, LD.  
[No. 2], 99 L. T. 513; 24 T. L. R. 749; 13 Com. Cas. 295; 11 Asp. M. C. 142—C. A.

11. *Deviation—Liability of Owners.*—Where a ship deviates from the voyage contemplated by the charter-party, the shipowners are not protected by exceptions from liability contained in the charter-party for damage to the cargo occurring either before or after such deviation, as they are then in the position of common carriers.

INTERNATIONALE GUANO-EN SUPERPHOS-  
[PHAATWERKEN v. ROBERT MACANDREW  
& CO., [1909] 2 K. B. 360; 78 L. J. K. B. 694;  
100 L. T. 850; 25 T. L. R. 529; 53 Sol. Jo.  
504; 14 Com. Cas. 194—Pickford, J.]

#### (c) Loading and Discharge of Cargo.

12. *Charter-party—Cancelling Clause—Supply of Stiffening—Readiness for Loading.*—The L. then being at C. discharging a cargo of coal and



### III. Hire of Ship—Continued.

intending to complete her discharge at I., was chartered to load at those two ports a full and complete cargo of nitrate. Clause 4 of the charter-party provided that "stiffening of nitrate to be supplied at I. but not before December 10th, 1907, on receipt of 48 hours' notice from captain of his readiness to receive same or lay days to count." Clause 13 provided that "should the vessel not have arrived at her loading port and be ready for loading . . . on or before noon of January 31st, 1908, charterers to have the option of cancelling this charter." The vessel arrived at I. on December 13th, 1907, having then on board more than half her coal cargo; and by January 27th, 1908, she had discharged as much of that cargo as could safely be unladen, unless some stiffening in the way of ballast or sufficient cargo was put on board. Between the time when that notice would expire, viz., on January 29th, and noon of January 31st, the coal still remaining on board could not have been discharged. The charterers refused to comply with the captain's notice requiring a supply of stiffening, unless the captain would agree to redeliver it if the charter-party was cancelled, and on January 31st they cancelled the charter. In an action by the shipowners against the charterers claiming damages for breach of charter-party:—

**HELD**—that the ship's being ready to receive stiffening was not the same thing as being ready for loading within the meaning of clause 13; that, as the ship was not ready to load cargo within the meaning of that clause by noon of January 31st, 1908, the charterers were entitled to exercise their option of cancelling the charter; and, therefore, that the action failed.

Decision of Lord Alverstone, C.J. (100 L. T. 736; 25 T. L. R. 503; 14 Com. Cas. 181; 11 Asp. M. C. 237) affirmed.

**SAILING SHIP** *LYDERHORN CO. v. DUNCAN*, [Fox & Co., [1909] 2 K. B. 929; 101 L. T. 295; 25 T. L. R. 739; 14 Com. Cas. 293—C. A.

#### (d) Miscellaneous.

**13. Damages for Breach of Charter-party—Indemnity.**—[The appellants chartered a ship of the respondents, and by the charter-party they were bound to present bills of lading which threw upon the ship no greater liability than that contemplated by the charter-party.

The ship loaded a cargo of cotton to be delivered in France, and bills of lading were signed by the master which specified the marks on the bales of cotton shipped. When the ship arrived at her port of discharge, the marks on some of the bales of cotton did not correspond with the marks specified in the bill of lading, and the consignees refused to accept them, the respondents having to pay damages for short delivery.

**HELD**—that they were entitled to recover from the appellants the amount so paid, it being the duty of the charterers under the charter-party to load bales properly marked as specified in the bill of lading.

Decision of C. A. affirmed.

**ELDER, DEMSTER & Co. v. DUNN & Co.**, 101 [L. T. 578—H. L.

### (e) Payment of Freight.

**14. Lien for Freight and Dead Freight—Liability of Holders of Bills of Lading.**—[By a clause in a charter-party a vessel was to have a lien on the cargo for recovery of all bill of lading freight, dead freight, etc. By the bills of lading the consignees, as well as "performing all other conditions and exceptions as per charter-party," were to pay freight, "per the rate of freight as per charter-party per ton of 2,240 lbs. gross weight delivered in full . . . 6d. less if ordered to a direct port on signing last bill of lading." The vessel was ordered to a direct port.

By the charter-party the vessel was not to earn more freight than she would with a full cargo of wheat or maize in bags, but the charterers might ship other lawful merchandise, in which case freight was to be paid on the vessel's dead-weight capacity for wheat or maize in bags at the agreed rate of 12s. 6d. per ton, subject to the reduction of 6d. if the vessel were ordered to a direct port. The charterers failed to complete the loading.

**HELD** (Vaughan Williams, L.J., dissenting)—that the owners were only entitled to recover freight at the rate of 12s. per ton delivered, and were not entitled to succeed in their claim with respect to dead freight.

Decision of Bray, J. (100 L. T. 268; 25 T. L. R. 269; 53 Sol. Jo. 162; 14 Com. Cas. 82) affirmed.

**RED "R." STEAMSHIP CO. v. ALLATINI** [BROS. AND OTHERS, 101 L. T. 510; 25 T. L. R. 791; 14 Com. Cas. 303; 11 Asp. M. C. 193—C. A.

#### (f) Period of Hire.

[No paragraphs in this vol. of the Digest.]

#### (g) Warranties.

[No paragraphs in this vol. of the Digest.]

### IV. INCORPORATION OF CHARTER-PARTY IN BILL OF LADING.

**15. Negligence Clause—Constructive Notice—Loss of Part of Cargo by Negligence—Liability of Shipowners.**—[By the terms of a charter-party the shipowners were exempted from liability in respect of loss occasioned by, *inter alia*, "accidents of navigation even when occasioned by negligence, default, or error in judgment of the master, mariners, or other servants of the shipowners." The bill of lading signed by the master, so far as it referred to the charter-party, contained only the words "all other conditions as per charter-party." The plaintiffs were the receivers of the cargo shipped under the bill of lading. In their contract of purchase they had stipulated with the sellers, "tonnage to be engaged on conditions of charter-party attached," which form contained the negligence clause. When the cargo arrived there was a shortage due to the negligence of those on board the vessel, in respect of which the plaintiffs sued the shipowners for damages.

**HELD**—(1) that the bill of lading did not incorporate the negligence clause in the charter-party; (2) that the fact that the plaintiffs, when making their contract, had stipulated for a special form of charter-party containing the negligence clause did not constructively affect them with

#### IV. Incorporation of Charter-party in Bill of Lading—*Continued.*

notice that the bill of lading should be in the same form and that the master had no right to sign the bill of lading in a form so as to vary the contract contained in the charter-party; (3) that there was no evidence that the plaintiffs, when they gave value for the bill of lading, had actual knowledge that it was in such a form that the master ought not to have signed it; and (4) that the shipowners were liable.

Decision of Deane, J., affirmed.

THE DRAUPNER, [1909] P. 219; 78 L. J. P. 90; [25 T. L. R. 438—C. A.]

#### V. CARRIAGE OF GOODS.

See also AGENCY, No. 1; CARRIERS, No. 2.

##### (a) Deviation of Ship.

**16. Exceptions in Charter-party—Protection Lost by Deviation.**—Where a ship deviates from the chartered voyage, the shipowners lose the protection of the exceptions from liability contained in the charter-party, not only in respect of damage occasioned to the cargo after the deviation, but also in respect of that which has been occasioned on the voyage prior thereto. In such a case the shipowners are in the position of common carriers.

INTERNATIONALE GUANO-EN SUPERPHOS-  
[PHAATWERKEN v. ROBERT MACANDREW &  
Co., [1909] 2 K. B. 360; 78 L. J. K. B. 691;  
100 L. T. 850; 25 T. L. R. 529; 53 Sol. Jo.  
504; 14 Com. Cas. 194—Pickford, J.]

##### (b) Discharge of Cargo.

[No paragraphs in this vol. of the Digest.]

##### (c) Documents of Title.

**17. Indorsement of Bill of Lading—Intention—Agent of Consignee—No Consideration—Right of Action as against Judgment Creditor and Sheriff—Special Property.**—N. was an unsatisfied judgment creditor of B. Corkwood having on it the mark of the B. firm was consigned to X. in London, and under a *fi. fa.* issued at N.'s instance was seized on arrival on board a steamship at the London Docks; McK. claimed the corkwood as agent for removal and warehousing under an indorsement of the bill of lading made by X. before the ship's arrival.

HELD—that, in order to succeed, the claimant must show that he had a general or special property in the goods or a right to present possession of them; that the effect of the indorsement of a bill of lading depends on the intention of the parties; that the object of the indorsement was only to enable him to hold and warehouse the goods for X., who had no intention to clothe him with any property in them, and that his claim therefore failed.

Sewell v. Burdick (10 App. Cas. 74; 54 L. J. Q. B. 156; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376—H. L.) applied.

BURGOS v. NASCIMENTO, [1908] W. N. 237; [100 L. T. 71; 53 Sol. Jo. 60; 11 Asp. M. C. 181—Eve, J.]

#### (d) Exceptions in Bill of Lading.

##### 18. Limit of Liability—Loss by Negligence.

The plaintiffs shipped two packages in the defendants' ship for carriage from London to Buenos Ayres, under a bill of lading which provided that "the master, owners, or agents of the vessel . . . shall not be accountable to any extent for bullion . . . nor for any other goods of whatever description beyond the amount of £2 per cubic foot for any one package . . . unless shipment be made upon a special order containing a declaration of the value . . . and extra freight as may be agreed upon be paid." The packages in question were each of greater value than £2 per cubic foot, but no declaration of their value was made or extra freight paid thereon. The defendants failed to deliver the goods at Buenos Ayres, and it was never ascertained how or when they had disappeared. In an action to recover their value:—

HELD—(1) (*per* Bigham, J.) that the mere non-delivery of the packages was evidence of negligence, but (2) (*per* Bigham, J., and Court of Appeal) that even where there had been negligence the defendants were exempted by the clause in the bill of lading from any liability beyond the amount of £2 per cubic foot for each package.

Decision of Bigham, J. ([1908] 1 K. B. 796; 77 L. J. K. B. 417; 24 T. L. R. 304) affirmed.

BAXTER'S LEATHER CO., LD. v. THE ROYAL  
[MAIL STEAM PACKET CO., [1908] 2 K. B.  
623; 77 L. J. K. B. 988; 99 L. T. 286; 24  
T. L. R. 537; 14 Com. Cas. 46; 11 Asp. M. C.  
98—C. A.]

**19. Negligence of Shipowners' Servants—Unseaworthiness.**—Sugar was carried under a bill of lading which contained exceptions relieving the shipowners from liability for damage arising from, *inter alia*, defects in machinery or neglect of the engineers. The exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances was to be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage.

The sugar was damaged by water getting into it through a three-way cock in a pipe which was not carefully turned and by the failure of a non-return valve to act in consequence of a piece of spun yarn having got into it. In an action to recover for the damage, it appeared that the chief engineer, who had been at the building yard superintending the machinery being put together in the ship, did not know that the cock would open three ways, and that he had neglected to test it.

HELD—that the ship was not in the circumstances reasonably fit to carry the plaintiffs' sugar; that the damage was due to unseaworthiness; and that the defendants were not protected by clause 10 of the bill of lading.

Decision of C. A. ([1909] P. 93; 78 L. J. P.



### V. Carriage of Goods—Continued.

13 : 100 L. T. 357 ; 25 T. L. R. 230 ; 11 Asp. M. C. 215—C. A.) reversed.

ABRAM LYLE AND SONS v. OWNERS OF S.S. [SCHWAN ; THE SCHWAN, [1909] A. C. 450 ; 78 L. J. P. 112 ; 101 L. T. 289 ; 25 T. L. R. 742 ; 53 Sol. Jo. 696—H. L.

**20. Refrigerating Machinery—Certificate by Lloyd's Surveyor—Damaged Cargo—Unseaworthiness—Liability of Shipowners.**—Under the terms of a bill of lading shipowners were exempted from liability in respect of a cargo of frozen meat shipped from South America, provided they obtained a certificate of Lloyd's surveyor at Monte Video that the refrigerating machinery and insulated spaces were in a fit and proper condition. The liability of the owners was further excepted in respect of damage occasioned by or arising from the default of officers, refrigerating engineers, etc., by or from any accidents, etc., or from unseaworthiness, provided reasonable means were taken to provide against such default, accidents, etc., and unseaworthiness. It was proved at the trial that the certificate was given by a surveyor nominated by Lloyd's agent at Monte Video, and that the damage was caused by unseaworthiness in respect of the refrigerating machinery, due to the neglect of the ship's agents and the refrigerating engineer.

HELD—that the ordinary and well-known meaning of "Lloyd's surveyor" was a surveyor appointed by Lloyd's Shipping Register, and the surveyor appointed by Lloyd's agent was not in the ordinary sense of the words a Lloyd's surveyor ; that the shippers were not bound by such certificate ; and as reasonable means were not taken, the owners were not protected by the bill of lading from the ordinary liability for unseaworthiness.

In a similar bill of lading the certificate was to be obtained from "Lloyd's Surveyor at United Kingdom." The vessel loaded the cargo in South America in April, 1906.

HELD—that a certificate called the R.M.C. certificate given when the vessel left this country in January, 1905, taken in conjunction with a certificate given at Durban on March 30th, 1906, was not a certificate within the meaning of the bill of lading.

SOUTH AMERICAN EXPORT SYNDICATE, LD., [AND ANOTHER v. FEDERAL STEAM NAVIGATION CO., LD., 100 L. T. 270 ; 25 T. L. R. 272 ; 53 Sol. Jo. 270 ; 14 Com. Cas. 228 ; 11 Asp. M. C. 195—Bray, J.

**21. Cesser of Liability when Goods Free of Ship's Tackle—Delivery to Landing Agent—Goods Afterwards Lost through Fraud.**—Goods were shipped for delivery at Penang under bills of lading which provided that the respondent company "is to have the option of delivering these goods or any part thereof into receiving ship on landing them at the risk and expense of the shipper or consignee as per scale of charges to be seen at the agent's office, and is also to be at liberty until delivery to store the goods or any

part thereof in receiving ship, godown, or upon any wharf, the usual charges therefor being payable by the shipper or consignee. The company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk, for all purposes and in every respect, of the shipper or consignee."

HELD—that the cesser of liability clause above quoted afforded complete protection to the respondents for the loss of goods which had been discharged into lighters, landed, and improperly delivered by a representative of their landing agents without production of the bills of lading or a delivery order in fraud of the appellants as holders of the bills of lading and delivery order.

THE CHARTERED BANK OF INDIA, AUSTRALIA, [AND CHINA v. BRITISH INDIA STEAM NAVIGATION CO., LD., [1909] A. C. 369 ; 78 L. J. P. C. 111 ; 100 L. T. 661 ; 25 T. L. R. 480 ; 53 Sol. Jo. 446 ; 14 Com. Cas. 189—P. C.

**22. Railway Company's Vessel—Unreasonable Conditions—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7—Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), s. 31.**—A railway company carried on one of their steamers a cargo under a bill of lading, which contained a clause exempting them from liability for every kind of negligence on the part of their servants.

HELD—that, in the absence of a *bona fide* alternative rate for the carriage of the cargo, such a condition was void as being unreasonable, within sect. 7 of the Railway and Canal Traffic Act, 1854.

RIGGALL AND SONS v. GREAT CENTRAL RY. [Co., 101 L. T. 392 ; 25 T. L. R. 754 ; 53 Sol. Jo. 716 ; 14 Com. Cas. 259—Pickford, J.

### (e) Freight.

**23. Dead Freight—Lien provided by Charter-party—Charges.**—By a clause in a charter-party it was provided that "the owner or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of all freight, demurrage, and all other charges whatsoever."

HELD—that the words "all other charges whatsoever" could not be read as including dead freight.

REDERIAKTIESELSKABET "SUPERIOR" v. [DEWAR AND WEBB, [1909] 1 K. B. 948 ; 78 L. J. K. B. 584 ; 100 L. T. 513 ; 25 T. L. R. 396 ; 53 Sol. Jo. 358 ; 14 Com. Cas. 99 ; 11 Asp. M. C. 232—Bray, J.

See S. C., on appeal (not as to above point), No. 29, *infra*.

### (f) Miscellaneous.

**24. Lightermen—Contract—"Reasonable Precautions"—Exemption from "Any Loss or Damage, including Negligence, which can be Covered by Insurance"—Negligence and Liability**



### V. Carriage of Goods—Continued.

*of Lightermen.*—The defendants, who were lightermen, agreed with the plaintiffs to transship a cargo of rosin from one ship to another on the terms that "every reasonable precaution is taken for the safety of the goods whilst in craft," and that they (the defendants) "will not be liable for any loss or damage, including negligence, which can be covered by insurance." Portions of the cargo were lost and damaged through the negligence of the defendants.

**HELD** (Cozens-Hardy, M.R., dissenting)—that the defendants had expressly and without ambiguity protected themselves from liability.

Decision of *Bray, J.* (100 L. T. 366; 25 T. L. R. 346; 53 Sol. Jo. 304; 14 Com. Cas. 78; 11 Asp. M. C. 231) reversed.

*ROSIN AND TURPENTINE IMPORT CO., LD. v. [B. JACOBS AND SONS, LD., 101 L. T. 56; 25 T. L. R. 687; 14 Com. Cas. 247—C. A.]*

#### (g) Short Delivery.

[No paragraphs in this vol. of the Digest.]

#### (h) Through "Bill of Lading."

[No paragraphs in this vol. of the Digest.]

#### (i) Warranties.

**25. Seaworthiness—Dangerous and Unusual Fitting—Character not Known to Persons Using it.**—A vessel is unseaworthy if it is fitted with an unusual and dangerous fitting, which will permit of water passing from the sea into her holds unless special care is used, and if those who have to use the fitting in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character which would not permit of water so passing however the fitting was used.

*ABRAM LYLE AND SONS v. OWNERS OF S.S. [SCHWAN; THE SCHWAN, [1909] A. C. 450; 78 L. J. P. 112; 101 L. T. 289; 25 T. L. R. 742; 53 Sol. Jo. 696—H. L.]*

*See S. C., supra, No. 19.*

### VI. DEMURRAGE.

*See also No. 29, infra.*

#### (a) Averaging Days.

[No paragraphs in this vol. of the Digest.]

#### (b) Colliery Guarantee.

[No paragraphs in this vol. of the Digest.]

#### (c) Commencement of Lay Days.

**26. "In Regular Turn"**—Construction of *Charter-party*.—By the terms of a charter-party the plaintiffs' vessel was to proceed to N. or to T. as ordered on arrival at E., and to deliver the defendants' cargo "in regular turn" with other vessels. The vessel being ordered to N. on arrival, and being there ready to deliver her cargo, her discharge was delayed until that of

another vessel, previously arrived and also consigned to the defendants, had been completed. The plaintiffs claimed demurrage.

**HELD**—that "in regular turn" here meant one vessel at a time, and that the lay days commenced to run, not when the vessel was ready for discharge, but when she took her turn after the other vessel.

*THE CORDELIA, [1909] P. 27; 78 L. J. P. 48; [100 L. T. 197; 11 Asp. M. C. 202—Div. Ct.]*

#### (d) Computation of Time.

[No paragraphs in this vol. of the Digest.]

#### (e) Custom of Port.

**27. Wood Cargo—Custom at Port of Hull.**—By the custom and practice of the port of Hull there is an absolute obligation on the receivers of wood cargoes to provide a suitable berth for the chartered steamship on her arrival in dock and to supply and have ready a clear quay space or sufficient beries for the discharge of the cargo, and not merely an obligation to use their best endeavours to provide such berth, quay space, or beries.

*AKTIESELSKABET HEKLA v. BRYSON, JAMESON [& Co., 100 L. T. 155; 25 T. L. R. 168; 14 Com. Cas. 1; 11 Asp. M. C. 186—Bray, J.]*

#### (f) Excepted Days.

[No paragraphs in this vol. of the Digest.]

#### (g) Exception of Strikes, etc.

**28. Shortage of Labour Occasioned by Plague—"Accident."**—A clause in a charter-party provided as follows:—"In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevents or delays the discharging, such time is not to count unless the steamer is already on demurrage."

**HELD**—that a shortage of labour occasioned by plague, whereby the discharging was delayed, did not excuse the charterers, inasmuch as it was not an "accident" or *ejusdem generis* with strikes, lock-outs, or civil commotions.

*Tillmanns v. Knutsford ([1908] A. C. 406; 77 L. J. K. B. 977; 99 L. T. 399; 24 T. L. R. 786; 13 Com. Cas. 334—H. L.)* followed.

*MUDIE v. STRICK & Co., LD., 100 L. T. 701; 25 [T. L. R. 453; 53 Sol. Jo. 400; 14 Com. Cas. 135; 11 Asp. M. C. 235—Pickford, J.]*

**HELD** on appeal—that the evidence was insufficient for the decision of the questions involved. A new trial ordered, the evidence given at the previous hearing to stand and to be supplemented by additional evidence (14 Com. Cas. 227—C. A.).

#### (h) Miscellaneous.

[No paragraphs in this vol. of the Digest.]

### VII. MARITIME LIENS.

*See also No. 14, supra.*

#### (a) Generally.

[No paragraphs in this vol. of the Digest.]

VII. Maritime Liens—*Continued.*

## (b) Owner's Lien.

29. *Lien Provided by Charter-party—Demurrage—Charges.*—A charter-party provided that "the owner or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of all freight, demurrage, and all other charges whatsoever."

HELD—that as against an indorsee of the bill of lading (which provided that he should pay freight and perform all other conditions as per charter-party) the words "all other charges whatsoever" could not be read as including expenses incurred by arrangement between shipowner and charterer outside any charter-party obligation.

HELD ALSO—that demurrage payable day by day may be subject to a lien.

Decision of Bray, J. ([1909] 1 K. B. 948; 78 L. J. K. B. 584; 100 L. T. 513; 25 T. L. R. 396; 53 Sol. Jo. 358; 14 Com. Cas. 99; 11 Asp. M. C. 232) varied.

REDERIAKTIESELSKABET "SUPERIOR" v. [DEWAR AND WEBB, [1909] 2 K. B. 998; 78 L. J. K. B. 1100; 101 L. T. 371; 25 T. L. R. 821; 14 Com. Cas. 320—C. A.]

## VIII. BOTTOMRY.

[No paragraphs in this vol. of the Digest.]

## IX. GENERAL AVERAGE.

[No paragraphs in this vol. of the Digest.]

## X. RULES FOR PREVENTING COLLISIONS.

## (a) Fog.

30. *Medway Conservancy Bye-laws, arts. 41, 43, 48 (c)—Collision—Speed—Ringing Bell at Anchor—Seamanlike Precaution—Both Vessels to Blame.*—In thick fog a steam tender ran into and sank a sailing barge at anchor in the Medway. The barge was not ringing a bell at short intervals as required in a fog by art. 43 (c) of the Medway Conservancy Bye-laws of vessels anchored in the fair way.

HELD—that both vessels were to blame, the tender for being navigated at too great a speed in fog contrary to art. 41 of the Medway Bye-laws, and the barge for not sounding a bell being anchored in the fair way, or even if not in the fair way, for not indicating her position as a seamanlike precaution within art. 48.

THE CLUTHA BOAT, 147, [1909] P. 36; 78 [L. J. P. 41; 100 L. T. 198; 11 Asp. M. C. 199—Barnes, Pres.]

31. *Failure to Hear Sound Signals—Proof of Negligence—Inevitable Accident.*—A vessel in charge of a compulsory pilot, having run into a fog, was rounding under a port helm to come to an anchor when she collided with a vessel lying at anchor whose bell was being regularly sounded for the fog. The bell of the vessel at anchor was not heard by those on the vessel coming to anchor until just before the collision.

HELD—that neither the pilot nor the crew of the vessel coming to anchor were negligent in not hearing the bell of the vessel at anchor, and

that, as the plaintiffs had failed to prove any negligence on the part of the defendants, the action must be dismissed.

THE NADOR, [1909] P. 300; 78 L. J. P. 106; 100 L. T. 1007—Bigham, Pres.

## (b) Generally.

32. *Sailing Vessel and Trawler—Trawler Engaged in Trawling—Duty to Keep Clear—Regulations for Preventing Collisions at Sea, 1897, arts. 9, 20.*—A sailing vessel ran into a steam trawler; the latter was trawling and exhibiting proper signals to indicate the fact, and was making about two and a half knots per hour.

The sailing vessel was held to blame for keeping no look-out.

HELD—that the trawler was also to blame for keeping her course and speed when the sailing vessel was seen bearing down upon her, for she was not so encumbered with her trawl as to excuse her for failing to keep clear of a sailing vessel.

THE CRAIGELLACHIE, [1909] P. 1; 77 L. J. P. 145; 99 L. T. 252; 11 Asp. M. C. 103—Bucknill, J.

33. *Collision Causing Death of Master—Payment of Compensation to Widow under Workmen's Compensation Act, 1906—Right to Recover from Owner of Ship in Fault—Action in personam—Remoteness of Damage—Rules for Preventing Collisions at Sea, arts. 17, 24.*—The sailing flat *Julia* was following the sailing flat *Annie* down the River Mersey and was an overtaking ship. The two vessels were tacking backwards and forwards across the river, and *The Julia* gradually overtook and collided with *The Annie*. The master of *The Julia*, in endeavouring to cut the painter of his boat when the collision occurred, was jerked into the river and was drowned, and his widow recovered from the owner of *The Julia*, in respect thereof, the sum of £300 as compensation under the Workmen's Compensation Act, 1906. In an action in personam in the Admiralty Division by the owner of *The Julia* against the owners of *The Annie* to recover as damages the amount he had so paid under the Workmen's Compensation Act, 1906:—

HELD—(1) that the overtaking rule of the Rules for Preventing Collisions at Sea (art. 24) did not apply; (2), that art. 17 (b) applied; (3) that it was the duty of the port tack vessel, *The Annie*, to put her helm up and keep out of the way of *The Julia*, and that as *The Annie* did not do so she was alone to blame; and (4) that the damages claimed were not too remote and were recoverable.

THE ANNIE, [1909] P. 176; 78 L. J. P. 81; 100 [L. T. 415; 25 T. L. R. 416; 11 Asp. M. C. 213—Deane, J.]

34. *River Thames—Overtaken Vessel—Duty to Keep Course—Overtaking Vessel—Duty to Keep Clear—Duty of Vessels Going Down River to Keep to the South of Mid-stream.*—Two steamships, both proceeding down the Thames, collided

## X. Rules for Preventing Collisions *Continued.*

in Gallions Reach somewhere between mid-river and the northern bank. Both vessels were held to blame, the overtaking vessel for not keeping clear of the overtaken vessel and the overtaken vessel for not keeping her course.

*Scumble*, vessels going down river should keep to the south of mid-stream.

THE GERE, [1909] P. 287; 78 L. J. P. 130; 100 [L. T. 620—Deane, J.

**35. Steam Trawler—“Proceeding” Vessel—Regulations for Preventing Collisions at Sea, Art. 20.**—A steam trawler, which, by reason of the fact that she is engaged in the operation of hauling in her trawl, is stationary and, until her trawl is up, is practically immovable, cannot be said to be “proceeding” within the meaning of art. 20 of the Regulations for Preventing Collisions at Sea so as to cast upon her the duty of keeping out of the way of a sailing vessel.

THE GLADYS, 26 T. L. R. 66—Bigham, Pres.

### (c) Lights.

[No paragraphs in this vol. of the Digest.]

### (d) Narrow Channel.

**36. *Lerwick Harbour.***—Lerwick Harbour, though a narrow piece of water, is not, apart from its two entrances, a narrow channel within the decisions on art. 25 of the Rules for Preventing Collisions.

THE SEYMOLICUS, [1909] P. 109; 78 L. J. P. 52; [100 L. T. 382; 11 Asp. M. C. 206—Deane, J.

### **37. Signal Not Answered—Duty to Stop.**

When two steamships are meeting in a narrow channel and one whistles to indicate that she is altering her course, and the other does not answer the signal, but appears to be acting in accordance with the rule of the road, the former vessel is justified in proceeding on her course cautiously at a moderate speed, and will not be held partially to blame for a collision which occurred from the fault of the other vessel because she did not stop altogether when she got no answer to her signal.

Judgment of Supreme Court for China and Corea reversed.

CHINA NAVIGATION CO. v. ASIATIC PETROLEUM [Co., 101 L. T. 547—P. C.

**38. *Firth of Forth—Regulations for Preventing Collisions at Sea, 1897, Art. 25.***—The Forth from the Forth Bridge upwards is a narrow channel in the sense of art. 25 of the Regulations for Preventing Collisions at Sea, 1897.

Decision of Ct. of Sess. ([1909] S. C. 561; 46 Sc. L. R. 338) affirmed.

SCREW COLLIER CO. v. WEBSTER, OR KERR, [[1909] W. N. 258; 47 Sc. L. R. 99—H. L. (Sc.)

### (e) Negligence.

See Nos. 30, 31, *supra*.

Y.D.

## (f) Sound Signals.

See No. 37, *supra*.

**39. *Falling Snow—Speed—Pilot's Responsibility—Regulations for Preventing Collisions at Sea, 1897, arts. 15, 16.***—A vessel approaching a squall of falling snow is not within arts. 15, 16, as to moderate speed and sound signals, although she should be so navigated as to be going only at a moderate speed when she herself becomes enveloped in the squall, and whilst in its vicinity should give such sound signals as good seamanship requires.

*Quere*, whether, if a pilot is compulsorily in charge, the sounding of such signals is within his province or the master's.

Decision of Barnes, Pres. ([1908] P. 320; 99 L. T. 552) affirmed.

THE ST. PAUL, [1909] P. 43; 78 L. J. P. 1; 100 [L. T. 184; 11 Asp. M. C. 169—C. A.

**40. *Breach of Regulations—Contributing to Collision—Regulations for Preventing Collisions at Sea, arts. 18, 28.***—Two steamships, *The Malin Head* and *The Corinthian*, approaching each other end on, or nearly end on, collided. Five minutes before the collision occurred *The Malin Head* was seen by those on board *The Corinthian* to be porting. When *The Malin Head* first ported she sounded one short blast, and then steadied and shortly afterwards hard-a-ported, but did not sound her whistle.

Deane, J., held that *The Corinthian* was alone to blame.

HELD—that *The Malin Head* was guilty of a breach of the conditions contained in art. 28 of the Regulations for Preventing Collisions at Sea in failing to sound a short blast when she hard-a-ported, and that, as it was impossible to say that such infringement of art. 28 could not by any possibility have contributed to the collision, *The Malin Head* was also to blame.

“The Bellanoch” ([1907] A. C. 269) has not altered or modified the rule laid down in “The Duke of Buccleuch” ([1891] A. C. 310).

Decision of Deane, J. (100 L. T. 411; 25 T. L. R. 330) varied.

THE CORINTHIAN, [1909] P. 260; 78 L. J. P. [121; 101 L. T. 265; 25 T. L. R. 693; 53 Sol. Jo. 650; 11 Asp. M. C. 208—C. A.

## (g) Tug and Tow.

[No paragraphs in this vol. of the Digest.]

## (h) Vessels Crossing.

**41. *Narrow Channel—Starboard Hand Rule—Vessels Crossing—Good Seamanship.***—Where vessels have to cross each other in a narrow channel there may be circumstances which prevent the starboard hand rule operating to its full extent. Where no local rule applies to a particular spot, vessels have to deal with each other on the footing of good seamanship, of course complying as far as possible with the necessity of keeping on their starboard hand of the channel. For instance, if two vessels approached the spot



## X. Rules for Preventing Collisions—Continued.

at the same time, it would be reasonable for the one which had the tide against her to wait while the other passed.

THE PRINCE LÉOPOLD DE BELGIQUE, [1909] P. 113; 78 L. J. P. 57; 100 L. T. 201; 25 T. L. R. 183; 11 Asp. M. C. 203—Barnes, Pres.

**42. Steamship and Sailing Vessel Meeting—Duty of Sailing Vessel to Keep her Course and Speed—Duty to Stand by—Regulations for Preventing Collisions at Sea, 1897, arts. 20, 21—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 422.]**—In a damage action brought by the owners of a sailing vessel to recover the damage they had sustained by a collision between their vessel and the defendants' steamship, it was held by Barnes, Pres., that the sailing ship was alone to blame for the collision for not keeping her course and speed under art. 21, as but for the alteration of her helm there would have been no collision, and a sailing ship may not take any action under that rule at a time when the other vessel can by any reasonable action avoid the collision. It was also held that the sailing ship had been guilty of a breach of sect. 422 of the Merchant Shipping Act, 1894, in not standing by, as there was no such danger to the sailing ship as necessitated her leaving the scene of the collision, and it is essential when a disaster of a serious character occurs that no vessel should leave another until the utmost steps have been taken to ascertain that lives and property are not left in peril.

HELD, on appeal—that the sailing ship was alone to blame for the collision, for the reasons stated in the Court below.

HELD FURTHER—that on the facts as found it was unnecessary to consider whether the sailing ship had been guilty of not standing by in breach of sect. 422 of the Merchant Shipping Act 1894.

Decision of Barnes, Pres., affirmed.

THE KIRK WALL, 100 L. T. 284; 11 Asp. M. C. [173—C. A.]

**43. Vessels Meeting End On—Narrow Channel—Lerwick Harbour—Collision Regulations, 1897, arts. 18, 25, 27, 28.]**—Two steam drifters, on nearly opposite courses, were meeting nearly end on in Lerwick Harbour; one of them sounded a two-blast signal on her whistle, whereupon the other starboarded a little, but the drifter which had sounded the two-blast signal ported, and a collision occurred.

HELD—that the drifter which had sounded the two-blast signal was alone to blame for the collision, as the other had not starboarded until after the two-blast signal had been sounded.

HELD FURTHER—that Lerwick Harbour is not a narrow channel, and that therefore the drifter which had starboarded was not to blame for not keeping on her starboard hand side of the harbour.

THE SEYMOLICUS, [1909] P. 109; 78 L. J. P. [52; 100 L. T. 382; 11 Asp. M. C. 206—Deane, J.]

## XI. COLLISION ACTIONS.

### (a) Division of Loss.

[No paragraphs in this vol. of the Digest.]

### (b) Limitation of Liability.

See also ADMIRALTY, No. 2.

**44. Owners' Actual Fault or Privity—Company as Owner—Agent or Servant—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 59, 503.]**—Sect. 503 of the Merchant Shipping Act, 1894, which enables the owner of a ship to limit his liability for loss or damage where it has occurred without his "actual fault or privity," refers to the actual fault or privity of the owner himself, and not to that of his agent or servant. In the case of a ship owned by a railway company the "owners" are the general body of shareholders, and not the person who is registered under sect. 59 of the Act as managing owner or ship's husband.

THE YARMOUTH, [1909] P. 293; 25 T. L. R. 746 [—Deane, J.]

### (c) Measure of Damages.

[No paragraphs in this vol. of the Digest.]

### (d) Practice.

**45. Burden of Proof—Obligation to Begin.]**—The plaintiffs sued to recover the amount of damage sustained by their vessel by reason of a collision between her and the defendants' vessel. The plaintiffs alleged that the defendants were solely to blame. The defendants denied negligence, and pleaded that the collision was solely caused by the negligent navigation of the plaintiffs' vessel. After the pleadings were closed the defendants admitted that their vessel was partly to blame for the collision.

HELD—that on the pleadings, even taken with the admission by the defendants, the burden of proof was upon the plaintiffs, and therefore the obligation to begin was upon them.

THE CADEBY, [1909] P. 257; 78 L. J. P. 85; [101 L. T. 48; 25 T. L. R. 630—Bigham, Pres.]

**46. Defence of Compulsory Pilotage—Practice as to Evidence of Pilot.]—Per Bargrave Deane, J.**—In collision cases where the defence of compulsory pilotage is set up, the pilot should have the opportunity of giving evidence although neither party calls him.

THE CARDIFF, [1909] P. 183; 78 L. J. P. 110; [25 T. L. R. 387—Deane, J.]

### (e) Miscellaneous.

**47. Standing by after Collision—Collision Deemed to be Caused by Vessel Failing to Stand by—"Proof to the Contrary"—Other Vessel Found Alone to Blame—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 422 (2).]**—Two vessels, the O. and the T., came into collision. While getting clear, the O. damaged the T. under water so that the latter sank about two hours later. The extent of the damage was not known at the time, but the O. signalled asking if assistance was required. As she received in reply

### XI. Collision Actions—*Continued.*

only long blasts on the whistle, she at once steamed away. In an action for damages the T. was held alone to blame. On the question of the O.'s failure to stand by:—

**HELD**—that, although the O. should have stood by, the finding that the T. was alone to blame for the collision was “proof to the contrary” within the meaning of sect. 422, subsect. 2, of the Merchant Shipping Act, 1894, so as to prevent the collision being deemed to have been caused by the wrongful act of the O. in accordance with that sub-section.

**THE TRYST.** [1909] P. 333—Bigham, Pres.

### XII. SALVAGE.

See **ADMIRALTY**, No. 3.

#### (a) Agreements for Salvage.

[No paragraphs in this vol. of the Digest.]

#### (b) Apportionment of Award.

[No paragraphs in this vol. of the Digest.]

#### (c) Basis of Valuation.

[No paragraphs in this vol. of the Digest.]

#### (d) Derelicts.

[No paragraphs in this vol. of the Digest.]

#### (e) Generally.

[No paragraphs in this vol. of the Digest.]

#### (f) Life Salvage.

[No paragraphs in this vol. of the Digest.]

#### (g) Practice.

[No paragraphs in this vol. of the Digest.]

#### (h) Towage.

[No paragraphs in this vol. of the Digest.]

### XIII. TOWAGE CONTRACTS.

**48. Construction of Contract—Liability for Loss Caused by Servant's Negligence—“Finding all Items of Transportation”—“All Transporting to be at Owners' Risk.”**—The defendants undertook to carry out certain repairs to the plaintiffs' vessel, and, for that purpose, to “transport vessel from berth to dry dock, finding all tugs, pilots, watermen and boats, sufficient hands for managing ship . . . and all items of transportation to loading berth.” In the margin of the accepted tender were printed the words, “All transporting to be at owners' risk.”

During the transportation the vessel got adrift from the only tug, and sustained damage, owing to the parting of an alleged defective rope belonging to the vessel, and to the delay caused by the eye of a wire hawser, also belonging to her, not fitting the towing hook.

**HELD**—that the defendants were liable, for, after undertaking to find “all items of transportation,” they had omitted to ascertain that the necessary items, to whomsoever belonging, were efficient for the purpose, and, owing to this neglect on their part, two tugs were, in the particular case, required for the safe handling of the vessel.

The marginal note only protected them

against risks incidental to navigation, provided they exercised reasonable care in carrying out the transportation.

**THE FORFEARSHIRE.** [1908] P. 339; 78 L. J. P. 144; 99 L. T. 587; 11 Asp. M. C. 158—Deane, J.

### XIV. PILOTAGE.

#### (a) Authority of Pilot.

[No paragraphs in this vol. of the Digest.]

#### (b) Defence of Compulsory Pilotage.

**49. Collision Action—Practice as to Evidence of Pilot.**—*Per Deane, J.*—In collision cases where the defence of compulsory pilotage is set up, the pilot should have the opportunity of giving evidence although neither party calls him.

**THE CARDIFF.** [1909] P. 183; 78 L. J. P. 110; [25 T. L. R. 387—Deane, J.]

#### (c) Exempted Ships.

See **DEPENDENCIES**, No. 19.

#### (d) Limits of Compulsory Pilotage.

[No paragraphs in this vol. of the Digest.]

#### (e) Miscellaneous.

**50. Damage to Jetty—Negligence—Inevitable Accident.**—The owners of a jetty sued the owners of a steamship to recover the amount of damage sustained by reason of the steamship running into the jetty. The defendants denied negligence, and in the alternative pleaded compulsory pilotage. The steamship was drawing 15 feet 4 inches, and when she came into the harbour she had only 2 feet of water under her, a fact that was not known to any one, as the tide was a foot lower on that day than, according to the tide-table, it should have been. There was a two-knot current and a strong wind coming against the vessel. The steamship had stopped her engines and was coming on with her own impetus. She then felt the full force of the current and wind, with the result that, disregarding her port helm, she made a sheer bodily to port. The pilot gave the order full speed astern, and repeated it as an emergency order, and it was obeyed as promptly as it should have been. The steamship, which was of a normal type, was equipped with old-fashioned engines, and it would take her twenty to twenty-five seconds to carry out the order, and before she could gather sternway she struck and damaged the jetty.

**HELD**—that the owners of the steamship had not been guilty of negligence; that the damage occurred through an inevitable accident, solely due to the extraordinary conditions prevailing at the time at the spot, and that the defendants were consequently not liable.

**THE BOUCAU.** [1909] P. 163; 78 L. J. P. 87; [100 L. T. 617; 25 T. L. R. 265; 11 Asp. M. C. 240—Deane, J.]

### XV. HARBOURS AND DOCKS.

See also **HIGHWAYS**, No. 4.

#### (a) Authority of Harbour Master.

[No paragraphs in this vol. of the Digest.]



## XV. Harbours and Docks—Continued.

## (b) Dues.

51. *Exemption—Lighter Entering Dock to Unload into Ship—Lighter Leaving Dock without Unloading—West India Docks Act, 1831 (1 & 2 Will. 4, c. lii.), ss. 76, 83—“Ship or Vessel Lying Therein”—Lighter Entering Dock before Ship—“Bonâ fide Engaged in so Discharging”—Barge Not Leaving by Next Available Tide—Rate for Lying in Dock—Sunday—London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), ss. 132, 133, 136—East and West India Dock Company’s Extension Act, 1882 (45 & 46 Vict. c. xc.), s. 25; Sched., Part I.—London and St. Katharine and East and West India Docks Act, 1888 (51 & 52 Vict. c. cxliii.), s. 57.]—By sect. 83 of the West India Docks Act, 1831, lighters entering into a dock to discharge or receive goods to or from on board of any ship or vessel lying therein shall be exempt from payment of rates so long as such lighter shall be *bonâ fide* engaged in discharging or receiving such goods.*

A lighter entered one of the docks for the purpose of discharging her cargo into a vessel lying therein, but was unable to do so because the vessel was already full, and the lighter thereupon left the dock without discharging any part of her cargo.

HELD by Lord Loreburn, L. C., Lord Macnaghten, Lord Robertson, and Lord Collins (Lord Ashbourne and Lord Atkinson dissenting)—that, as the lighter had not discharged any part of her cargo, she was not exempt from payment of rates.

Decision of C. A. ([1908] 1 K. B. 786; 97 L. T. 357; 23 T. L. R. 590; 10 Asp. M. C. 512) reversed.

Section 136 of the London and St. Katharine Docks Act, 1864, provides that “All lighters and craft entering into the docks . . . to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods.”

A lighter finished discharging into a ship in a dock on the afternoon of Saturday, and the next high tide was at midnight. The ship left the dock by that tide, but the lighter remained in the dock until 1 a.m. on Monday. The dock company claimed 6*d.* per ton on the lighter’s tonnage under a rate which provided that lighters, having discharged or received goods to or from a ship and remaining in dock beyond the first available tide, should pay 6*d.* per ton register per week.

HELD—that when the lighter stayed on in the dock after midnight of the Saturday she ceased to be “*bonâ fide* engaged in discharging,” and was not exempt from the rate.

A lighter entered a dock for the purpose of discharging into a ship which was then lying in the dock. The ship was unable to take the cargo owing to want of cargo space. The lighter then discharged into a ship which came into the dock after the lighter.

HELD—that the lighter was not exempt from rates, as it was a condition of exemption that

the ship into which the barge discharged should be lying in the dock at the time when the lighter entered.

Decision of C. A. ([1908] 2 K. B. 175; 97 L. T. 674; 23 T. L. R. 765; 10 Asp. M. C. 557) reversed.

LONDON AND INDIA DOCKS CO. v. THAMES [STEAM TUG AND LIGHTERAGE CO. THE SAME v. MCDUGALL AND BONTHON, LD. THE SAME v. PAGE, SON AND EASTON, LD., [1909] A. C. 15, 25; 78 L. J. K. B. 90, 157; 99 L. T. 590; 24 T. L. R. 834; 52 Sol. Jo. 713; 14 Com. Cas. 32, 71; 11 Asp. M. C. 162—H. L.

52. *Pier—Constructed Ostensibly under Provisional Order—Order in fact not Complied with—Public Nuisance—Passenger Rates—Tonnage Rates for Vessels “Mooring” at the Pier—Recovery of Rates Paid under Protest—Right of Owners of Pier to Exclude Vessels—The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), ss. 25, 33, 47—The General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), ss. 3, 15, 16.]—By a Provisional Order, confirmed by a special Act of Parliament, a company were authorised to construct within certain limits a pier extending some 500 yards from above high-water mark into the sea, with power, upon the certificate of the Board of Trade that all necessary consents required on the part of the Board of Trade under the Order or otherwise had been given, to levy certain rates for passengers using the pier and for vessels “mooring” within the limits. The pier was constructed partly within and partly without the prescribed limits, and the certificate of the Board of Trade was not obtained. The company went into liquidation, and in 1899 H. became the purchaser of the pier.*

For some years prior to July, 1907, the plaintiffs ran excursion steamers to the pier, and paid the rates which H. demanded. In June, 1907, H. leased the pier to the defendant company, who declined to allow the plaintiffs’ steamers to call at the pier except on payment of a fixed sum for the season for passengers, and also for the “mooring” rates specified in the order. The plaintiffs claimed an injunction to restrain the defendants from excluding their ships and passengers from using the pier, and repayment of the rates paid under protest since July 1st, 1907.

HELD—(1) that the pier, being unauthorised, was a nuisance, and that no statutory rights arose in favour of the plaintiffs or defendants; (2) that as the pier was the defendants’ property they could exclude the plaintiffs from using it; (3) that the rates paid under protest could not be recovered, because the plaintiffs had received the consideration for such payment; and (4) that the plaintiffs’ steamers, when alongside and made fast to the pier for the purpose of embarking and disembarking passengers, were not “moored” within the meaning of the Order.

Decision of Neville, J. ([1908] 2 Ch. 460; 77 L. J. Ch. 658; 72 J. P. 385; 24 T. L. R. 712) affirmed.

LIVERPOOL AND NORTH WALES STEAMSHIP [CO., LD. v. MERSEY TRADING CO., LD., [1909] 1 Ch. 209; 78 L. J. Ch. 17; 73 J. P. 19; 99 L. T. 863 25 T. L. R. 89—C. A.



**XV. Harbours and Docks—Continued.****(c) Liability of Harbour Authority.**

[No paragraphs in this vol. of the Digest.]

**(d) Liability of Wharf Owner.**

[No paragraphs in this vol. of the Digest.]

**(e) Miscellaneous.**

[No paragraphs in this vol. of the Digest.]

**XVI. MISCELLANEOUS SHIPPING REGULATIONS.**

**53. Provision of Lifebelts—One Lifebelt for each Person on Board—Life Saving Appliances Rules, Division D, Class 3—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 427, 428, 430.]**—The rules made by the Board of Trade under s. 427 of the Merchant Shipping Act, 1894, provide that steamships not certified to carry passengers and employed solely in the coasting trade shall carry lifebelts so that there may be one lifebelt for "each person on board the ship."

The respondent, the master of the British steamship S., was summoned for non-compliance with the above rule. The S. was engaged in the coasting trade and was not certified to carry passengers. Having on board thirty-four persons, being her crew of seven men, and twenty-seven other persons, and having only seven lifebelts on board, the S. proceeded from the port of King's Lynn to the Lynn Roads, where the H. was waiting to be lightened. The H. was lying within the limits of the port of King's Lynn at the mouth of the River Ouse and about twelve miles from the pier from which the S. started.

**HELD**—that the respondent had committed the offence charged, as the words "each person on board the ship" were not confined to the crew and to passengers carried under an obligation, but included all persons on board, and the S. was proceeding on a voyage or excursion within the meaning of s. 430 (1) (a) of the Merchant Shipping Act, 1894.

**GENOCHIO v. STEWARD**, 100 L. T. 525; 73 J. P. [158; 11 Asp. M. C. 226—Div. Ct.]

**SHOP HOURS REGULATIONS.**

*See* LOCAL GOVERNMENT: PUBLIC HEALTH.

**SHOWS.**

*See* THEATRES.

**SLANDER.**

*See* LIBEL AND SLANDER.

**SLANDER OF TITLE.**

*See* TORTS.

**SLAUGHTER-HOUSE.**

*See* PUBLIC HEALTH.

**SMALL DWELLINGS.**

*See* LOCAL GOVERNMENT.

**SMALL HOLDINGS AND ALLOTMENTS.**

**1. Order Made by County Council for Acquisition of Land—Confirmation by Board of Agriculture and Fisheries—Power of Court to Review Order—Small Holdings and Allotments Act, 1908 (8 Edw. 7, c. 36), ss. 39, 41.]**—An order made by a county council under sect. 39 of the Small Holdings and Allotments Act, 1908, for the acquisition of land for the purposes of the Act is, when confirmed by the Board of Agriculture and Fisheries, final, and is not subject to review by the Court of King's Bench.

**EX PARTE RINGER**, 73 J. P. 436; 25 T. L. R. [718; 53 Sol. Jo. 745; 7 L. G. R. 104]—Div. Ct.

**SMUGGLING.**

*See* REVENUE.

**SOCIETIES.**

*See* CLUBS: FRIENDLY SOCIETIES; INDUSTRIAL AND PROVIDENT SOCIETIES.

**SOLICITORS.**

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**III. CERTIFICATE.**

[No paragraphs in this vol. of the Digest.]

**IV. CONFIDENTIAL RELATION.**

1. *Law Agent—Bargains between Law Agent and Client not Relating to Ordinary Law Business—Building Speculations—Fairness of Bargains.*—The relationship of law agent and client does not cease when the business transaction between them ceases to be ordinary law business. Contracts, therefore, of any sort—*e.g.*, a building speculation—between a law agent and his client are to be regarded with the strictest scrutiny.

AITKEN *v.* CAMPBELL'S TRUSTEES, [1909] S. C. [1217; 46 Sc. L. R. 830—Ct. of Sess.]

**V. COSTS.**

See also PRACTICE, XXIII.

**(a) General.**

2. *Solicitor and Client—Verbal Agreement by Plaintiff to Pay no Costs to Solicitor—Right of Successful Plaintiff to Costs from Defendant—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), ss. 4, 5.*—A client who has made a verbal arrangement with his solicitor not to pay the latter any costs of an action which the solicitor is conducting on his behalf is precluded by the provision of sect. 5 of the Attorneys and Solicitors Remuneration Act, 1870, from recovering any costs from the other side, although successful in the action.

GUNDRY *v.* SAINSBURY, [1909] W. N. 213; 101 [L. T. 685; 26 T. L. R. 42; 54 Sol. Jo. 33—Div. Ct.]

3. *Compromise of Action without Intervention of Solicitor.*—The plaintiff brought an action to

recover £400, the balance due under a building contract. Shortly before the action was expected to be in the paper for trial by an official referee, the plaintiff and the defendant had an interview, the only other person present being the defendant's secretary, at which, in spite of a written protest on the part of the plaintiff's solicitor, they settled the action on certain terms, including the payment by the defendant to the plaintiff of £200 in discharge of all claims including costs. The defendant gave the plaintiff a crossed cheque to order for £180 drawn on a country bank, and the plaintiff, who was an undischarged bankrupt, immediately endorsed it to one of his sons. On hearing of this the plaintiff's solicitor requested the defendant to stop payment of the cheque, but the defendant refused to do so. Thereupon, on an application by the plaintiff's solicitor, the official referee made an order that the defendant should pay the plaintiff's solicitor his costs on the ground that the plaintiff and defendant had settled the action behind the back of the plaintiff's solicitor, knowing and intending that the settlement would have the effect of depriving the solicitor of his costs.

HELD—that there was no evidence from which it could be inferred that the defendant intended the plaintiff's solicitor to lose his costs.

REYNOLDS *v.* REYNOLDS, 26 T. L. R. 104—C. A.

**(b) Bills of Costs.**

4. *Country Solicitor—London Agent—Practice—Order of Course—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), ss. 3, 17.*—An order directing a London agent to deliver a bill of costs to his country client will not be discharged on the ground that it is contrary to the practice of the Chancery Division to grant a country client such an order on a petition of course.

Smith *v.* Dimes ((1849) 4 Exch. Rep. 32) followed.

IN RE WILDE, [1909] W. N. 230; *sub nom.* IN [RE A SOLICITOR, 54 Sol. Jo. 67—Neville, J.]

5. *Taxation After Payment—Special Circumstances—"Disbursements"—Not Discharged When Bill Delivered—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 41—R. S. C., Ord. LXV., 27, sub-rule 29A of 1909.*—On October 12th, 1907, solicitors delivered to their clients bills of costs which included items charged as "disbursements" for counsel's fees and a printer's bill. These had not been paid at the time of the delivery of the bills, but were discharged before payment on June 22nd, 1908, of the balance of the bills of costs. On December 16th the clients issued a summons to tax.

HELD—that the charge by itself for "disbursements" which had not been paid at the date of the delivery of the bills was not, upon the facts of the case, a special circumstance justifying an order for taxation after payment of the bills.

IN RE MASSEY, [1909] W. N. 211; 101 L. T. 517; [26 T. L. R. 68; 54 Sol. Jo. 50—Joyce, J.]

## V. Costs—Continued.

## (c) Charging Orders.

[No paragraphs in this vol. of the Digest.]

## (d) Taxation.

See also No. 5, *supra*.

6. *Common Order to Tax—Submission to Pay Amount Certified—Statute-barred Items—Unconditional Order—Solicitors Act, 1843* (6 & 7 Vict. c. 73), s. 37.]—A solicitor delivered a bill of costs to an urban district council, for whom he had acted as clerk. Within one month the council took out a summons under the Solicitors Act, 1843, sect. 37, asking that the bill of costs might be taxed, but on the footing that statute-barred items should be disallowed.

HELD—that where a client applies for taxation within one month after delivery of a bill of costs, and does not claim delivery up of papers, no submission to pay ought to be inserted in the order for taxation; but that where a submission to pay is required, the submission should be to pay only what is certified as payable, by which is meant recoverable having regard to, *inter alia*, the Statute of Limitations, and the order should direct the taxing Master to certify where necessary what is due, as distinct from payable, with a view to ascertain the amount for which there is a lien.

Decision of Warrington, J. ([1909] 1 Ch. 354) reversed.

IN RE BROCKMAN, [1909] 2 Ch. 170; 78 L. J. [Ch. 460; 100 L. T. 821; 25 T. L. R. 595; 53 Sol. Jo. 577—C. A.]

7. *Light Railways Act, 1896* (59 & 60 Vict. c. 48)—*Provisional Order—Parliamentary or Chancery Scale—Charges before Retainer—Deposit of Plans.*]—The costs of and connected with the preparation and making of a provisional order under the Light Railways Act, 1896, are taxed on the Chancery, and not the Parliamentary, scale.

Decision of Eve, J. ([1909] W. N. 149; 53 Sol. Jo. 617) affirmed.

IN RE PETERSON, [1909] 2 Ch. 398; 101 L. T. [480; 73 J. P. 461; 53 Sol. Jo. 735—C. A.]

8. *Petition of Course—Dispute as to Facts—Order Discharged.*]—A client obtained an order for taxation of his solicitor's bill of costs by presenting a petition of course. It appeared subsequently that there was a dispute as to the facts between him and his solicitor affecting his right to have the order.

HELD—that he ought to have proceeded by way of special application.

IN RE C. (A SOLICITOR), 53 Sol. Jo. 616—[Warrington, J.]

9. *No Solicitor on Record—Defendant Entering Appearance in Person—Subsequent Employment of Solicitor—No Notice Filed at Central Office—Action Dismissed.*]—A defendant in an action entered an appearance in person. In the subsequent proceedings a solicitor represented him and was thereafter recognised by the

plaintiff's solicitors as acting on behalf of the defendant for all purposes in the action. The action being eventually dismissed for want of prosecution, the defendant's solicitor carried in his bill of costs for taxation. The taxing Master disallowed the defendant's solicitor's charges on the ground that the defendant had appeared in person, and that, no notice of change having been filed in the Central Office, no solicitor for the defendant appeared on the record.

HELD—that, as the plaintiffs had received notice of the appointment of the defendant's solicitor, and had recognised him as such, it would be contrary to justice to treat the omission to put his name on the record as an incurable irregularity.

Decision of Bucknill, J., reversed.

MASON v. GRIGG, [1909] 2 K. B. 341; 78 L. J. [K. B. 819; 101 L. T. 217—C. A.]

10. *Taxation after Payment—Special Circumstances—Agreement by Third Party to Pay a Solicitor's Costs Against his Client—Jurisdiction of Master to Construe Agreement.*]—After a solicitor's bill has been paid taxation may be ordered on the ground of "special circumstances," and that phrase is not confined to cases where overcharge, fraud, or excessive pressure is proved, but includes any circumstances which a Judge in the exercise of his discretion considers sufficiently exceptional to justify taxation.

In re Norman ((1886) 16 Q. B. D. 673; 55 L. J. Q. B. 202; 54 L. T. 143; 34 W. R. 313—C. A.) followed.

Where a third party has agreed to pay a bill of costs due to a solicitor from a client the taxing Master has jurisdiction to construe the agreement for purposes of the taxation; therefore a dispute as to its construction does not prevent an order being made for taxation.

Decision of C. A. ([1908] 1 K. B. 982; 77 L. J. K. B. 930; 52 Sol. Jo. 684) affirmed with slight variation as to the costs incurred in C. A.

IN RE HIRST AND CAPES, [1908] A. C. 416; 77 [L. J. K. B. 938; 99 L. T. 624—H. L.]

11. *Taxation more than Twelve Months after Delivery of Bill of Costs—Special Circumstances—Solicitors Act, 1843* (6 & 7 Vict. c. 73), s. 37.]—Solicitors brought an action on a bill of costs delivered more than twelve months before. The Master, on giving liberty to sign judgment, did not order taxation. On appeal, Phillimore, J., ordered taxation. Against this order the plaintiffs appealed, on the ground that there were no special circumstances proved enabling the Court or Judge to order taxation under sect. 37 of the Solicitors Act, 1843. An affidavit of the defendant alleging overcharges was before the Judge, but no affidavit of the plaintiffs. Before the Court of Appeal an affidavit in answer to the defendant's was produced by the plaintiffs.

HELD—that the materials before the Court of Appeal were different from those before the Judge, and that there were no special circumstances giving ground for taxation.

In re Chessman ((1891) 2 Ch. 289) distinguished.



V. *Costs—Continued.*

Decision of Phillimore, J., reversed.

GAME AND KILNER *v.* LINLEY, 53 Sol. Jo. 198  
—C. A.

12. *Taxation after Payment—“Special Circumstances”—Reservation of Right to Tax—Pressure—Overcharges—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 41.*—The reservation of a right to tax on payment of a bill of costs does not, standing alone, amount in all cases to a special circumstance within the meaning of sect. 41 of the Solicitors Act, 1843; but, taken together with other circumstances, such as overcharges, it may give rise to a right to tax after payment.

IN RE TWEEDIE, SOLICITORS, [1909] W. N. 110;  
[53 Sol. Jo. 487—Eve, J.]

13. *Taxation After Payment—“Special Circumstances”—Mistake in Scale Charges—Scale Charges where Work not All Done—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 41—Solicitors Remuneration Act, 1881 (44 & 45 Vict. c. 44), General Order, Sched. I, rr. 3, 6, and 11.*—A solicitor delivered a bill of costs (which was paid) containing overcharges due to a mistake as to the proper scale charges and to scale charges for work which was not all done.

HELD—that the overcharges in themselves were sufficient to have the bill referred for taxation.

IN RE G. (A SOLICITOR). 53 Sol. Jo. 469—  
[Neville, J.]

14. *Three Counsel—Co-Defendants—Expert Evidence—Costs of Uncalled Witnesses—R. S. C., Ord. LXV., 27 (29).*

The costs of three counsel will be allowed on a party and party taxation in a case where there are special complications, even though the interests of the defendants separately represented are identical and they act in combination in defending the action.

The costs of expert witnesses will be allowed in a proper case even though they are not called at the trial.

GREAT WESTERN RY. CO. *v.* CARPALLA UNITED  
[CHINA CLAY CO. (No. 2)], [1909] 2 Ch. 471;  
101 L. T. 383; 53 Sol. Jo. 699—Eve, J.]

(e) *Solicitors' Remuneration Act, 1881.*

15. *Special Agreement—Cash Account—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), s. 8, sub-s. 1, 4.*—On a common order to tax a solicitor's bills of costs the taxing Master has no jurisdiction to include in such taxation an item in an account headed “Cash Account,” representing work done under a special agreement.

Decision of Warrington, J., (53 Sol. Jo. 598) reversed.

IN RE T. & C. (SOLICITORS), 101 L. T. 144; 53  
[Sol. Jo. 672—C. A.]

16. *Scale Fee—“Preparing, Settling, and Completing Lease and Counterpart”—Part only of Work Done by Solicitor—Delivery of Bill One Month before Action—Solicitors Act, 1843*

(6 & 7 Vict. c. 73), s. 37—*Solicitors' Remuneration Order, 1882, Sched. I, Part II.*—A solicitor who has done part only of the work entitling him to the scale fee under Part II. of Sched. I. of the Solicitors' Remuneration Order, 1882, must deliver a bill a month before bringing an action for his costs, particularising the items of work and disbursements, pursuant to sect. 37 of the Solicitors Act, 1843.

LÓMAS *v.* JOSEPH, 53 Sol. Jo. 271—Div. Ct.

VI. *COVENANT IN RESTRAINT OF TRADE.*

[No paragraphs in this vol. of the Digest.]

VII. *LIABILITY.*

[No paragraphs in this vol. of the Digest.]

VIII. *LIEN.*

17. *Company being Wound up—Liquidator—Documents in Solicitor's Hands and Subject to Lien before Date of Winding-up Order.*—A solicitor was conducting an action for a company against three of its directors for a declaration that they had acted since becoming unqualified and for penalties and an injunction. Whilst the action was in progress a winding-up order was made. The liquidator continued the action, but eventually changed his solicitor.

HELD—that the old solicitor had a lien against the liquidator for his unpaid costs upon those documents in the action which were in his hands at the date of the winding-up order.

IN RE RAPID ROAD TRANSIT CO., [1909] 1 Ch.  
[96; 78 L. J. Ch. 132; 99 L. T. 774; 53 Sol.  
Jo. 83—Neville, J.]

IX. *MISCONDUCT.*

See also *BANKRUPTCY*, No. 7.

18. *Payment of Counsel's Fees—Resort to Court by Counsel Not Encouraged.*—The idea that counsel should resort to the disciplinary machinery of the Court in order to get their fees from solicitors is not to be encouraged. Where a solicitor had in fact paid the fees in full after the proceedings had begun, he was, nevertheless, ordered to pay the costs of the proceedings before the Law Society and of the motion before the Court.

IN RE A SOLICITOR, EX PARTE THE LAW  
[SOCIETY, *Times*, January 28th, 1909—Div. Ct.]

19. *Secret Commission—Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34).*—Observations by Lord Alverstone, C.J., as to solicitors taking secret commissions.

IN RE A SOLICITOR, EX PARTE THE LAW  
[SOCIETY, 26 T. L. R. 22—Div. Ct.]

X. *PRACTICE.*

See *EXECUTORS*, No. 16.

XI. *SOLICITOR TRUSTEE.*

[No paragraphs in this vol. of the Digest.]

XII. *UNDERTAKINGS.*

[No paragraphs in this vol. of the Digest.]

## XIII. UNQUALIFIED PERSONS.

**20. Solicitor Knowingly Permitting Unqualified Person to Use his Name—Denial of Knowledge by Solicitor—Inference Based on Suspicion—Discretion as to Striking off Roll—Suspension—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 32.**—Where a solicitor knowingly permits an unqualified person to use his name contrary to sect. 32 of the Solicitors Act, 1843, the Court has no discretion to inflict a less punishment on the solicitor than that of striking him off the roll. So held by the Divisional Court, following *Re Kelly*, [1895] 1 Q. B. 180. But where on appeal the solicitor denies that he in fact knew what was being done by the unqualified person, the inference to be drawn from the solicitor's conduct to the contrary gives the Court a discretion, as, the proceedings against the solicitor being of a quasi-criminal character, such a charge cannot be held to be established on suspicion or supposition, and the Court in that case has discretion to punish the offence by suspension.

IN RE TWO SOLICITORS AND AN UNQUALIFIED PERSON. EX PARTE THE INCORPORATED LAW SOCIETY, 53 Sol. Jo. 342—C. A.

## SOUTH AUSTRALIA.

See DEPENDENCIES AND COLONIES.

## SPECIFIC PERFORMANCE.

See also CONTRACTS, No. 6; DEPENDENCIES, No. 11.

**1. Option to Purchase—"Repayment" of Part of the Purchase Money to be Secured by Mortgage—Not an Agreement for a Loan.**—An agreement giving an option to purchase property, part of the purchase money to be paid at the time of purchase and the "repayment" of the balance to be secured by mortgage, is not in any true sense a contract to lend and borrow money such that specific performance of it will not be granted.

STARKEY v. BARTON, [1909] 1 Ch. 284; 78 [L. J. Ch. 129; 100 L. T. 42—Parker, J.

**2. Sale of Timber—Contract Not Under Seal—Want of Mutuality—Irrevocable Licence to Enter Upon Land—Legal and Equitable Interests.**—By virtue of a contract of sale of timber not under seal, the plaintiffs had the right to enter upon the lands of the defendant, fell timber thereon, and remove it. The defendant repudiated the contract while it was being carried out, and forcibly ousted the plaintiffs from the lands.

In an action brought by the plaintiffs against the defendant the Court may grant an injunction restraining the defendant from preventing the due execution of the contract, as well as damages. Such relief is not by way of specific performance in the sense of compelling the vendor to do anything.

Equity may restrain a vendor from revoking the licence to enter conferred by such a contract, though it might be unable to compel the purchaser to cut the timber if he refused to do so.

Since the Judicature Acts it may well be doubted whether the absence of a deed in such a case can be relied on in any Court.

Sect. 52 of the Sale of Goods Act, 1893, seems to confer on the Court a statutory power of enforcing at the instance of a purchaser specific performance of a contract for the sale of ascertained goods, whether or not the property has passed by the contract.

*Quere*, whether a contract for the sale of timber to be cut by the purchaser does not confer an interest at law of such a nature as to make the licence to enter *ab initio* an irrevocable licence.

JAMES JONES & SONS, LD. v. EARL OF TANKERVILLE, [1909] 2 Ch. 440; 78 L. J. Ch. 674; 101 L. T. 202; 25 T. L. R. 714—Parker, J.

**3. Verbal Agreement to Make Provision by Will—Vagueness.**—An agreement to make ample provision for a person by will is too vague to be enforced.

MACPHAIL v. TORRANCE, 25 T. L. R. 810—Joyce, J.

## SPIRITS.

See FOOD AND DRUGS; INTOXICATING LIQUORS; REVENUE.

## SPORT AND SPORTING.

See GAME.

## STAMPS AND STAMP DUTIES.

See REVENUE.

## STATUTES.

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See also COMPANIES, No. 12

## I. CONSTRUCTION.

**1. Rejection of Words—Intention of Legislature—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23).**—The Court of Criminal Appeal may in reading the Criminal Appeal Act, 1907, reject, transpose, or even imply words, if this be necessary to give effect to the intention and meaning of the

**I. Construction—Continued.**

Legislature, which is to be ascertained from a careful consideration of the entire statute.

R. v. ETTRIDGE, [1909] 2 K. B. 24; 78 L. J. [K. B. 479; 100 L. T. 624; 73 J. P. 253; 25 T. L. R. 391; 53 Sol. Jo. 401—C. C. A.]

**II. RETROSPECTIVE OPERATION.**

2. *Trade Union—Action Against—Commenced in 1905—Trade Disputes Act, 1906* (6 Edw. 7, c. 47), s. 4—*Retrospective Application.*—It is not reasonable to suppose that, where rights have accrued and become vested, the Legislature, which deals with futurity, interferes with such vested rights unless the intention to do so is expressed in clear terms.

Where a writ was issued against a trade union in 1905, the Trade Disputes Act, 1906, sect. 4, affords no bar to the action.

No intention to vary the rights of the parties to a pending action is to be found in any part of the Trade Disputes Act, 1906.

SMITHIES v. NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS AND OTHERS, [1909] 1 K. B. 310; 78 L. J. K. B. 259; 100 L. T. 172; 25 T. L. R. 205—C. A.

3. *Prevention of Crime Act, 1908* (8 Edw. 7, c. 59), ss. 10 (1), 19 (2)—*Crime Committed after Passing and before Coming into Operation of the Act.*—The Prevention of Crime Act, 1908, was passed on December 21st, 1908. By sect. 19, sub-sect. 2, of that Act: "This Act shall come into operation on the first day of August, 1909." A crime was committed on July 13th, 1909, and on October 7th, 1909, its perpetrator was convicted on indictment of the crime, and of being a habitual criminal.

HELD—that the words in sect. 10, sub-sect. 1, of the Act, "Where a person is convicted on indictment of a crime committed after the passing of this Act," etc., meant after the actual passing of the Act on December 21st, 1908, and not the date of August 1st, 1909, when the Act came into operation, and that, therefore, the offender could be convicted under the Act of being a habitual criminal.

R. v. SMITH; R. v. WESTON, [1909] W. N. 210; [26 T. L. R. 23; 54 Sol. Jo. 137—C. C. A.]

**STATUTE OF FRAUDS.**

See CONTRACT; EVIDENCE; SALE OF GOODS; SALE OF LAND.

**STATUTE OF LIMITATIONS.**

See LIMITATION OF ACTIONS; REAL PROPERTY AND CHATTELS REAL.

**STATUTE OF USES.**

See REAL PROPERTY AND CHATTELS REAL; SETTLEMENTS; TRUSTS AND TRUSTEES; WILLS.

**STOCK EXCHANGE.**

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See also AGENCY; BANKRUPTCY; CONTRACTS; GAMING AND WAGERING; MORTGAGE.

**I. RULES AND CUSTOMS.**

1. *Transfer of Inscribed Stock—Stockbroker Identifying Transferor of Stock—Forged Transfer—Stockbroker Held Liable to Bank—Claim by Stockbroker against Person Introducing Transferor.*—B. by his clerk introduced to the defendant, who was a stockbroker, a person who said she was, and whom B. and his clerk *bonâ fide* believed to be, the holder of certain India stock inscribed in the books of the Bank of England, the introduction being for the purpose of carrying through a transfer of the stock. The defendant, believing the person introduced to him to be the holder of the stock, attended with her and identified her as the holder at the Bank. The person so introduced was not in fact the holder of the stock and she forged the name of the real holder in the transfer book. The defendant was paid his fee in the matter by B. The Bank having had to replace the stock, and having been held entitled to be indemnified by the defendant in respect thereof, the defendant now claimed to be indemnified by B.

HELD—that the defendant was not entitled to the indemnity claimed, inasmuch as all that B. by his clerk had done was merely to introduce to the defendant the person who alleged herself to be the real holder of the stock and who was *bonâ fide* believed to be so by B.

THE BANK OF ENGLAND v. CUTLER—BARTRUM, [THIRD PARTY, 25 T. L. R. 509—Lawrence, J.]

2. *Continuation Note—"Net"—Custom of Stock Exchange—Secret Profit—Deposit of Shares as Cover—Blank Transfer—Power to Sell—Notice.*—The word "net" in a continuation note is not a sufficient disclosure to a principal, not acquainted with the Stock Exchange custom, of the fact that the sum so qualified includes a charge by the broker for his services in respect of the carry-over.

The whole of a block of shares, deposited as



**I. Rules and Customs—Continued.**

cover in respect of sums due on a cash transaction, and accompanied by a blank transfer, may be disposed of, after reasonable notice, to meet the sums due.

STUBBS v. SLATER AND BOND, [1909] W. N. [237; 54 Sol. Jo. 82—Neville, J.]

**II. BROKERS AND CLIENTS.****(a) In General.**

**3. Privity of Contract—Purchase of Shares by Client—Purchase by Broker of Larger Parcel of Shares—Sale for Special Settlement—Implied Conditions—Special Settlement within a Reasonable Time.**—Where a broker is authorised by several clients to buy different parcels of shares and he buys the total number in one contract, it is a question of intention to be gathered from the evidence in each case whether privity of contract is established between the vendor and the purchaser.

The defendants in 1899 purchased 300 shares in a company for special settlement. The share certificates of the company were not ready to be issued till February, 1907, and the special settlement was fixed for March 25th, 1907. The defendants contended that the contract was to be construed as subject to an implied condition that the special settlement should take place within a reasonable time after the date of the contract, and that, as the special settlement did not take place within a reasonable time, they were not bound by the contract.

HELD—that the defendants were liable, as the contract was effective as it stood, and was not subject to the suggested implied condition.

THE CONSOLIDATED GOLD FIELDS OF SOUTH AFRICA v. E. SPIEGEL & Co., 100 L. T. 351; 25 T. L. R. 275; 53 Sol. Jo. 245; 14 Com. Cas. 61—Bray, J.

**4. Purchase of Shares—Broker—Commission—"Net" Price—Duplicated Shares—Right of Purchaser to Recover Price Paid.**—An agent, e.g., a stockbroker, may be remunerated in such manner as he and the principal mutually agree. It is perfectly legal to employ a stockbroker, as agent, to buy or sell stocks or shares at a fixed price and to give him as his remuneration any advantage he may obtain in the price, whether the price be less or more, according as he is employed to buy or sell. In such circumstances the stockbroker does not necessarily become a principal.

The plaintiff bought certain shares in a company. At the time when the transferor purported to transfer them to the plaintiff the whole of the shares comprised in the transfer had been allotted to and belonged to other persons, and the transferor was never registered as the owner of them. The plaintiff, who paid for the shares on the faith of the transfers, subsequently received share certificates from the company. In an action against the vendor to recover the amount paid for the shares:—

HELD—that there had been a total failure of

consideration, and that the plaintiff was entitled to recover the money he had paid for the shares.

PLATT v. ROWE (TRADING AS CHAPMAN AND [ROWE]) AND C. M. MITCHELL & Co., 26 T. L. R. 49—Eady, J.

**5. Outside Brokers—Special Offer—Profit Guaranteed—Purchase or Appropriation of Stock—Subsequent Transfer—Deal to other Stock—Closing Deal at Fixed Price—Right to Recover Profit.**—A firm of outside stockbrokers advertised a "special offer" that if £10 were sent to them they would guarantee a profit of 600 per cent. and the £10 back if the matter were left in their hands. The plaintiff accordingly sent £10 and was informed by the defendants that they had bought 1,000 Canadian Pacifics and appropriated them to him. Subsequently, on representation being made on behalf of the plaintiff that the Canadian Pacifics had not altered in price, coupled with a demand for the return of the £10, the defendants agreed to transfer the deal to other stock, the second deal to be closed if the stock reached a certain price, which would give the plaintiff a profit of £80. The price of this stock went up and exceeded that fixed for closing the deal. The plaintiff therefore claimed the £80.

HELD—that the plaintiff was entitled to recover the amount claimed, as the defendants had agreed in view of his prior rights as regards the Canadian Pacifics to buy and sell the second stock at certain prices fixed by him; *semble*, that he could have recovered the amount promised on the deal in Canadian Pacifics subject to his showing that a reasonable time had elapsed for the deal.

DUTSON v. HUMBERT NEPHEW & Co., *Times*, [February 1st, 1909—Phillimore, J.]

**(b) Carrying Over.**

[No paragraphs in this vol. of the Digest.]

**(c) Closing Accounts.**

[No paragraphs in this vol. of the Digest.]

**(d) Defaulting Brokers.**

[No paragraphs in this vol. of the Digest.]

**STOPPAGE IN TRANSIT.**

See CARRIERS; SALE OF GOODS; SHIPPING AND NAVIGATION.

**STREETS.**

See HIGHWAYS, STREETS AND BRIDGES; MAGISTRATES, No. 6; METROPOLIS.

**STREET BETTING.**

See GAMING AND WAGERING

# STREET RAILWAYS.

See TRAMWAYS AND LIGHT RAILWAYS.

## STREET TRAFFIC.

I. HACKNEY CARRIAGES . . . . .	COL. 599
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(a) Offences.	
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### I. HACKNEY CARRIAGES.

See METROPOLIS, No. 10.

### II. MOTOR CARS.

#### (a) Offences.

##### (i.) *Driving and Speed*.

1. *Driving in a Manner Dangerous to the Public—Speed Over Twenty Miles per Hour—Conviction for Former Offence—Bart to Conviction for Latter—Motor Car Act, 1903* (3 Edw. 7, c. 36), ss. 1 (1) and 9 (1).—The respondent was summarily convicted under sect. 1 (1) of the Motor Car Act, 1903, of driving a motor car in a manner dangerous to the public. In deciding to convict, the magistrate took into consideration, besides other circumstances, the question of speed, which he considered to be an element of danger, and which, according to the evidence of the police, was shown by their stop-watches to have been thirty-three and a half miles per hour.

HELD (Jelf, J., dissenting)—that the conviction was a bar to the respondent being subsequently convicted on the same facts of driving at over twenty miles per hour contrary to sect. 9 (1) of the same Act.

WELTON v. TANEBORNE, 99 L. T. 668 ; 72 J. P. [419 ; 24 T. L. R. 873 ; 6 L. G. R. 891 ; 21 Cox, C. C. 702—Div. Ct.

2. *Exceeding Speed Limit—Evidence—Identity of Driver—Contents of Licence—Notice to Produce—Secondary Evidence—Motor Car Act, 1903* (3 Edw. 7, c. 36), ss. 3 (4), 9 (1).—On the prosecution of the driver of a motor car for exceeding the speed limit fixed by sect. 9 (1) of the Motor Car Act, 1903, it is not necessary to give the defendant notice to produce his licence, in order to let in evidence as to its contents by the police

constable who stopped the car, and to whom the licence was produced by the driver at the time.

MARSHALL v. FORD, 99 L. T. 796 ; 72 J. P. 480 ; [6 L. G. R. 1126—Div. Ct.

3. *Light Locomotive—Definition—Weight of less than Five Tons Unladen—Locomotives on Highways Act, 1896* (59 & 60 Vict. c. 36), s. 1—*Locomotives Act, 1898* (61 & 62 Vict. c. 29), ss. 5 (1) (b) and 17 (2)—*Motor Car Act, 1903* (3 Edw. 7, c. 36), s. 12—*Heavy Motor Car Order, 1904, Art. III.*—Sect. 5 (1) (b) of the Locomotives Act, 1898, requires that in the case of any locomotive, not being a steam-roller, passing on any highway, there shall be three men in attendance, and sect. 17 (2) of the same Act provides that nothing in the Act shall apply to locomotives that are light locomotives within the Locomotives on Highways Act, 1896. Sect. 1 of the Locomotives on Highways Act, 1896, defines a light locomotive as one which, subject to certain conditions, weighs less than three tons unladen. Sect. 12 of the Motor Car Act, 1903, gives the Local Government Board power to increase the maximum weight mentioned in sect. 1 of the Locomotives on Highways Act, 1896. The Local Government Board, by Art. III. of the Heavy Motor Car Order, 1904, provided that except as otherwise provided in the regulations a heavy motor car may be used on a highway, if its weight unladen does not exceed five tons. The appellant was summoned for using on a highway a locomotive (not being a steam-roller) not having three men in attendance. The locomotive was propelled by steam and weighed 4 tons 15 cwt. unladen. In other respects it complied with the conditions laid down in sect. 1 of the Locomotives on Highways Act, 1896.

HELD—that all self-propelled vehicles, whether light or heavy motor cars, were "light locomotives" if their weight unladen did not exceed five tons, and that the locomotive came within the exemption contained in sect. 17 (2) of the Locomotives Act, 1898.

EVANS v. NICHOLL, [1909] 1 K. B. 778 ; 78 [L. J. K. B. 428 ; 100 L. T. 496 ; 73 J. P. 154 ; 25 T. L. R. 239 ; 7 L. G. R. 386—Div. Ct.

4. *Rule of Road—Passing Tramcar Proceeding in Same Direction—"Carriage"—"Proceeding"—Motor Cars (Use and Construction) Order, 1904, Arts. I., IV.*—A tramcar is a "carriage" within the meaning of Art. I. of the Motor Cars (Use and Construction) Order, 1904, and therefore a motor car in passing a tramcar proceeding in the same direction is bound under Art. IV. of the same Order to do so on the right or off side of the tramcar.

A tramcar is still proceeding in a particular direction though it may be temporarily stopped.

BURTON v. NICHOLSON, [1909] 1 K. B. 397 ; [78 L. J. K. B. 295 ; 100 L. T. 344 ; 73 J. P. 107 ; 25 T. L. R. 216 ; 7 L. G. R. 535—Div. Ct.

5. *Driving at Speed Dangerous to Public Village—Evidence of Danger—Motor Car Act, 1903* (3 Edw. 7, c. 36), s. 1.—The applicant was convicted under sect. 1 of the Motor Car Act,

## II. Motor Cars—Continued.

1903, for having driven a motor car at a speed which was dangerous to the public, having regard to all the circumstances of the case. The evidence was that he drove the car through a village at the rate of twenty-three miles an hour.

HELD—that on that evidence the justice could properly convict the applicant of the offence charged.

EX PARTE STONE, 73 J. P. 444; 25 T. L. R. 787  
[—Div. Ct.]

6. *Driving at a Speed Exceeding Twenty Miles an Hour—Notice of Intended Prosecution—Service of Notice—Motor Car Act, 1903* (3 Edw. 7, c. 36), s. 9.]—The appellant was charged with driving a motor car at a speed exceeding twenty miles an hour, contrary to sect. 9, sub-sect. 1, of the Motor Car Act, 1903. Written notice of the intended prosecution was sent to him by a police officer leaving it at the chambers where he resided, with the porter employed at and in charge of those chambers. The police officer informed the porter of the purpose of the notice, and the appellant did not go into the witness box to deny having received it. The police officer stated that he was afterwards told by the porter that the notice had been given to the appellant.

HELD—that the giving of the notice to the porter was *prima facie* evidence that it had been "sent" to the appellant, and that there was *prima facie* evidence that the porter had authority to receive letters, etc., for the appellant.

MARTIN v. BROOMAN, 73 J. P. 484; 25 T. L. R. 783—Div. Ct.

7. *Exceeding Speed Limit—Warning as to "Traps"—Warning Driver—Obstruction of Police—Prevention of Crimes (Amendment) Act, 1885* (48 & 49 Vict. c. 75), s. 2—*Motor Car Act, 1903* (3 Edw. 7, c. 6), s. 9 (1).]—The employee of an association of motor car owners, who is stationed on a highway for the purpose of warning the drivers of motor cars belonging to members of the association that they are approaching a measured distance over which police officers intend to take the speed of the cars, and who accordingly does give such warning to the drivers of such motor cars, which at the time of the warning are being driven at a rate of speed exceeding twenty miles an hour, contrary to sect. 9 (1) of the Motor Car Act, 1903, the result of the warning being that the cars are slowed down and pass through the measured distance at a speed not exceeding twenty miles an hour, is guilty of the offence of wilfully obstructing the police in the execution of their duty, contrary to sect. 2 of the Prevention of Crimes (Amendment) Act, 1885.

BASTABLE v. LITTLE ([1907] 1 K. B. 59; 76 L. J. K. B. 77; 96 L. T. 115; 71 J. P. 52; 23 T. L. R. 38; 5 L. G. R. 279; 21 Cox, C. C. 354—Div. Ct.) distinguished.

BETTS v. STEVENS, [1909] W. N. 200; 101 L. T. 564; 73 J. P. 486; 26 T. L. R. 5; 7 L. G. R. 1052—Div. Ct.

8. *Exceeding Speed Limit—Specification of Limits of Locus—Motor Car Act, 1903* (3 Edw. 7, c. 36), s. 9.]—An accused was charged with an offence against the Motor Car Act, 1903, inasmuch as "on the public road between B. and D., and in particular on a quarter of a mile thereof," in the parish of K. "opposite C. farm," he had driven a motor car at a speed exceeding twenty miles an hour. B. and D. were about six miles apart.

HELD—that the *locus* of the alleged offence was not sufficiently specified, and conviction quashed.

CONNELL v. MITCHELL, [1909] S. C. (J.) 13; [46 Sc. L. R. 241—Ct. of Justy.]

### (ii.) *Emission of Smoke.*

[No paragraphs in this vol. of the Digest.]

### (iii.) *Construction.*

9. *Lights—Identification Plate Not Illuminated—Responsibility of Owners for Omission by Serjeant—Motor Car (Registration and Licensing) Order, 1903, Art. 11.*]—The appellants, a motor-cab company, were charged with aiding and abetting one of their drivers in committing an offence under the Motor Car Acts, 1896 and 1903. At the hearing it was found that the driver in question was driving one of the appellants' motor-cabs more than one hour after sunset without having the identification plate at the back of the cab illuminated; that the lamp was hanging too low and was showing a light beneath the plate; that a proper bracket was provided on which to hang the lamp; and that it was the duty of the appellants' foreman to see that the cabs went out all right. The appellants contended that the driver must have taken the lamp from another cab, but of this there was no evidence. The stipendiary magistrate convicted the appellants on the ground that there was carelessness on their part in not seeing that a proper lamp was fixed on the cab.

HELD—that an appeal from the conviction must be dismissed, as there was ample evidence on which to conclude that the cab was sent out by persons for whom the appellants were responsible in a condition which did not comply with the law.

PROVINCIAL MOTOR CAB COMPANY v. DUNNING, [1909] 2 K. B. 599; 78 L. J. K. B. 822; 101 L. T. 231; 73 J. P. 387; 25 T. L. R. 646; 7 L. G. R. 765—Div. Ct.

10. *"Two Independent Brakes"—Engine Locking Wheels—Motor Car (Use and Construction) Order, 1904, art. 2.—Heavy Motor Car Order, 1904.*]—The appellant was summoned for not having two independent brakes on the motor car he was driving. The motor car had one brake on the back wheels, and the only other brake was that obtained by using the engine so as to lock the wheels. The magistrate found that, although the engine could be used as a brake, it was not an independent brake, and convicted the appellant.



**II. Motor Cars—Continued.**

HELD—that the conviction was right.

WILMOTT v. SOUTHWELL, 99 L. T. 839; 72 [J. P. 491; 25 T. L. R. 22; 7 L. G. R. 8—Div. Ct.

(iv.) *Miscellaneous.*

**11. Mark Indicating Registered Number—Size of Letters—Conviction—Liability to Indorsement—Motor Car Act, 1903 (3 Edw. 7, c. 36), ss. 2 (2), (4), 4 (1). 7 (1) Motor Car (Registration and Licensing) Order, 1903.]**—The offence of driving on a public highway a motor car on which the mark indicating the registered number of the car is not composed of letters and figures of the size prescribed by the regulations made by the Local Government Board under sect. 7 (1) of the Motor Car Act, 1903, is not merely an offence against the regulations, but is an offence under the Act, and, therefore, a conviction for such an offence is the subject of indorsement under sect. 4 (1) of the Act.

R. v. GILL, EX PARTE MCKIM, 100 L. T. 858; [73 J. P. 290; 78 L. G. R. 589—Div. Ct.

(b) **Appeals.**

[No paragraphs in this vol. of the Digest.]

(c) **Royal Parks.**

**12. Regulations Fixing Limit of Speed—Indorsement of Licence—Parks Regulation Act, 1872 (35 & 36 Vict. c. 15)—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 4.]**—Sect. 4 of the Motor Car Act, 1903, makes it obligatory on the Court before whom a person is convicted of a third or subsequent offence, consisting of exceeding the ten-mile limit of speed fixed for the Royal parks by the rules issued on April 28th, 1904, under the Parks Regulation Act, 1872, to indorse the defendant's licence with the particulars of the conviction, although those rules were not issued until after the date when the Motor Car Act, 1903, came into operation, namely, January 1st, 1904.

R. v. PLOWDEN, [1909] 2 K. B. 269; 78 L. J. [K. B. 733; 100 L. T. 856; 73 J. P. 266; 25 T. L. R. 430; 7 L. G. R. 584—Div. Ct.

**III. MISCELLANEOUS.**

**13. Omnibus—Not Licensed to Ply for Hire—Starting from Outside Urban District—Bringing Passengers Within—Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 45—Town Police Clauses Act, 1889 (52 & 53 Vict. c. 14), s. 3.]**—A carriage, which was not licensed to ply for hire in the urban district of M., was run to and from S. Road in the city of Liverpool, and the Elephant Hotel in M. The proprietor charged threepence between S. Road and M., twopence between S. Road and the boundary between the urban district of M. and Liverpool, and no charge was made between M. and the said boundary. The carriage sometimes stood and waited on the highway at the Elephant Hotel, and sometimes commenced the return journey towards Liverpool immediately, and at the same point passengers entered the carriage for the purpose of the journey towards Liverpool. Signs outside the carriage indicated

the destination thereof, and intending passengers, on inquiry, were informed of its destination.

HELD—that the above facts were evidence that the carriage was standing and plying for hire in the urban district of M. without having obtained a licence to ply for hire in the urban district of M., and that the proprietor was properly convicted.

R. v. FLETCHER, 72 J. P. 249; 98 L. T. 749; [6 L. G. R. 583; 21 Cox, C. C. 578—Div. Ct.

**SUBPŒNA.**

See CRIMINAL LAW; EVIDENCE.

**SUBROGATION.**

See EQUITY.

**SUCCESSION DUTY.**

See DEATH DUTIES.

**SUICIDE.**

See CRIMINAL LAW AND PROCEDURE.

**SUMMARY JURISDICTION.**

See MAGISTRATES.

**SUNDAY TRADING.**

See TIME.

**SUPPORT.**

See DAMAGES; EASEMENTS; MINES.

**SURETY.**

See GUARANTEE AND INDEMNITY.

**SURGEONS.**

See MEDICINE AND PHARMACY.

**SWINE FEVER.**

See ANIMALS.

**TAIL, TENANTS IN TAIL.**

See REAL PROPERTY AND CHATTELS  
REAL; SETTLEMENTS.

**TAXATION.**

See DEATH DUTIES; INCOME TAX; IN-  
HABITED HOUSE DUTY; LAND TAX;  
REVENUE.

**TAXATION OF COSTS.**

See ARBITRATION; COUNTY COURTS;  
PRACTICE AND PROCEDURE; SOLI-  
CITORS, ETC.

**TELEGRAPHS AND  
TELEPHONES.**

	COL.
I. TELEPHONES . . . . .	605
II. SUBMARINE CABLE . . . . .	606

[No paragraphs in this vol. of the Digest.]

**I. TELEPHONES.**

1. *Exception from Postmaster-General's Exclusive Privilege—Telegraph "Used Solely for Private Use"—"Maintained for the Private Use of" a Person—Telegraph Act, 1869 (32 & 33 Vict. c. 73), s. 5.*—Sect. 5 of the Telegraph Act, 1869, excepts from the exclusive privileges of the Postmaster-General, conferred by sect. 4, "telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof."

HELD—that this meant that the owner alone could use the telegraph, and that it could not be said to be used solely for his private use if the wire was at his office at one end, and at the other end, or at a number of places throughout its length, it was at the offices of other people who were not his agents or servants.

Sect. 5 also excepts from the Postmaster-General's exclusive privileges "telegrams transmitted by a telegraph maintained for the private use of a corporation, company, or person, and in respect of which, or of the collection, receipt, and transmission or delivery of which, no money or valuable consideration shall be or promised to be made or given."

HELD—that this meant that if the real purpose of maintaining the telegraph was for the

private use of the corporation, company, or person, outside persons might be allowed to use it for their own affairs, provided such use was occasional only and was gratuitous.

Decision of the Court of Appeal ([1908] 2 Ch. 172; 77 L. J. Ch. 707; 72 J. P. 307; 24 T. L. R. 665) reversed.

POSTMASTER-GENERAL *v.* NATIONAL TELE-  
[PHONE CO., LD., [1909] A. C. 269; 78 L. J. Ch.  
422; 100 L. T. 658; 73 J. P. 321; 25 T. L. R.  
487; 53 Sol. Jo. 429—H. L.

2. *Wayleaves—Iron or Wooden Poles—Expense—Objection by Local Authority—Reasonableness—Telegraph Act, 1863 (26 & 27 Vict. c. 112), s. 12—Telegraph Act, 1878 (41 & 42 Vict. c. 76), s. 3.*—It may not be a sufficient ground to justify the withholding by a local authority of their consent under sect. 12 of the Telegraph Act, 1863, required to be obtained by the Postmaster-General, that he proposes to erect painted wooden poles to carry the wires in a street instead of painted iron poles (which latter would entail considerably more expense), and that the local authority are of opinion that iron poles would be more in keeping with the amenities of the street.

It may be reasonable, however, for a local authority to require telephone wires to be laid underground in a street where the purchasers of the houses in that street are of a class that might reasonably have concluded that they were acquiring property in a district where telephone poles would not be erected in the footway in front of their premises.

IN RE POSTMASTER-GENERAL AND WOOLWICH  
[BOROUGH COUNCIL, 72 J. P. 186; 6 L. G. R.  
509; 13 Rly. Cas. 165—Rly. and Can. Com.]

3. *Wayleaves—Poles in Footway—Objection by Local Authority—Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 6, 9, 12—Telegraph Act, 1878 (41 & 42 Vict. c. 76), ss. 3, 4, 5.*—Where a local authority withhold their consent under sect. 12 of the Telegraph Act, 1863, to the erection of poles for telephone wires in a street on the ground that in their opinion the poles will cause an obstruction to the thoroughfare, they must be prepared to establish that the obstruction caused will be substantial.

IN RE POSTMASTER-GENERAL AND WATFORD  
[URBAN DISTRICT COUNCIL, 72 J. P. 184; 52  
Sol. Jo. 302; 6 L. G. R. 504; 13 Rly. Cas. 160  
—Rly. and Can. Com.]

**II. SUBMARINE CABLE.**

[No paragraphs in this vol. of the Digest.]

**TENANT FOR LIFE AND  
REMAINDERMAN.**

See RENT-CHARGES AND ANNUITIES;  
SETTLEMENTS; TRUSTS AND TRUS-  
TEES; WILLS.

**TENDER.**

See CONTRACT; MONEY; MORTGAGE.

**TESTAMENTARY****CAPACITY.**

See WILLS.

**THAMES, RIVER.**

See METROPOLIS; SHIPPING AND NAVIGATION; WATERS AND WATER-COURSES.

**THEATRES, MUSIC-HALLS, AND SHOWS.**

See MAGISTRATES, No. 4.

**THEFT.**

See CRIMINAL LAW AND PROCEDURE.

**THREATS.**

See CRIMINAL LAW AND PROCEDURE.

**TIME.**

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| I. COMPUTATION OF TIME . . . | COL. 607 |
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And see COMPULSORY PURCHASE; LANDLORD AND TENANT; SHIPPING.

**I. COMPUTATION OF TIME.**

See also No. 3, *infra*; TRAMWAYS, No. 4.

**1. Compulsory Powers—Expiration of Time Limited for Exercise—Land already Acquired by Company—Common Law Right as Owners to Construct Railway thereon.**—A railway company were authorised to construct a railway; but a section of the special Act provided that if the railway was not completed within five years then the powers given by the Act to the company for making and completing the railway were to cease.

**HELD**—that this proviso applied merely to powers which the company could only exercise by virtue of the Act; and that if the company before the end of the five years had lawfully acquired the right to use the necessary land, and were incorporated for the purpose of making the

railway, they could do so even after the expiration of the five years under their common law powers.

Decision of C. A. ([1908] 2 Ch. 644; 77 L. J. Ch. 820; 99 L. T. 676) affirmed.

**MIDLAND RY. CO. v. GREAT WESTERN RY. CO.**, [1909] A. C. 445; 78 L. J. Ch. 686; 101 L. T. 142; 53 Sol. Jo. 671—H. L.

**2. Notice to be Given on Certain Date—Given before Date—Notice to be Given "Within Seven Days Prior" to Certain Date.**—A notice to terminate a catering contract made with regard to yearly periods, which notice is required to be given on March 1st, is not bad if given on February 26th.

A notice required to be given "within seven days prior" to a certain date is not required to be given at least seven days before that date.

**ELLIOTT v. POPULAR PLAYHOUSES, LD.**, [Times, April 1st, 1909—Eady, J.

**II. SUNDAY OBSERVANCE.**

See also DEPENDENCIES, No. 7; DISTRESS, No. 1; INTOXICATING LIQUORS, Nos. 11, 12.

**3. Mayor's Court—Notice of Appeal—Computation of Time—Sunday—Sunday Observance Act, 1677 (29 Car. 2, c. 7)—Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 8.**—Sunday must be excluded in computing the period of two days within which notice of appeal has to be given under sect. 8 of the Mayor's Court of London Procedure Act, 1857.

**R. v. Middlesex Justices** ((1848) 17 L. J. M. C. 111) followed and applied.

**MILCH v. FRANKAU & Co., LD.**, [1909] 2 K. B. [100; 78 L. J. K. B. 560; 100 L. T. 1002; 25 T. L. R. 498; 53 Sol. Jo. 577—Div. Ct.

**4. Sunday Trading—Married Woman—Conviction of Husband for Similar Offence on Same Day—Different Shops—Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 1.**—The appellant, who was a married woman, was summoned under sect. 1 of the Sunday Observance Act, 1677, for selling sweets on Sunday in a shop used by the appellant and her husband, who was the owner of the business. The appellant managed the business in the absence of her husband. Prior to the conviction of the appellant, her husband was convicted of a similar offence committed on the same day at another shop.

**HELD**—that there being evidence that the appellant had committed the offence charged, she was rightly convicted.

**BILLINGHAM v. MENHINICK**, 73 J. P. 384—[Div. Ct.

**5. Sunday Trading—Prosecution—Consent of Chief Officer of Police—Superintendent Appointed to Act in Absence of Chief Constable—Sufficiency of Consent of Superintendent—Sunday Observation Prosecution Act, 1871 (34 & 35 Vict. c. 87), ss. 1, 2, and Schedule.**—By sect. 1 of the Sunday Observation Prosecution Act, 1871, no prosecution shall be taken against any person for any



**II. Sunday Observance—Continued.**  
offence under the Sunday Observance Act, 1677 (29 Car. 2, c. 7), except with the consent in writing of the chief officer of police of the police district, or of two justices or a stipendiary magistrate having jurisdiction in the place.

**HELD**—that for the purpose of giving such consent the chief officer of police is a *persona designata*, and the consent cannot be given by the police officer who by the resolution of a council has been duly appointed to act in the absence of the chief officer as deputy for the chief officer and who is in fact so acting.

**R. v. HALKETT**, [1909] W. N. 205; 101 L. T. 603—Div. Ct.

**TITHES.**

See ECCLESIASTICAL LAW.

**TOLLS.**

See HIGHWAYS; MARKETS AND FAIRS;  
WATERS AND WATERCOURSES.

**TORTS.**

- I. IN GENERAL.  
[No paragraphs in this vol. of the Digest.]
- II. SLANDER OF TITLE.  
[No paragraphs in this vol. of the Digest.]
- See ANIMALS, IV.; LIBEL, No. 3; SALE OF GOODS, No. 7.

**TRADE AND TRADE UNIONS.**

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V. TRADE UNIONS.	
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See also NUISANCE, No. 6.

**I. TRADE NAME.**

1. *Similarity of Name—Injunction.*—[Injunction granted restraining the defendant company from carrying on business under its present name

or any other name so closely resembling the plaintiff bank's name as to be calculated to deceive.

**THE STANDARD BANK OF SOUTH AFRICA, LD.**  
[v. THE STANDARD BANK, LD., 25 T. L. R. 420; 26 R. P. C. 310—Eve, J.]

2. *Imitation—Defendant's own Name—Adoption of Partnership Name when no Partnership Exists—Father and Son.*—The plaintiffs had for many years traded in Dublin and elsewhere as seedsmen, nurserymen, and florists under the name of Alex. Dickson & Sons, and had established a considerable trade and reputation for Irish roses and Irish seeds. The defendant, Alexander Dickson, had for many years carried on business as a nurseryman and seedsman in the city of Dublin, at first under his own name, but for the past twelve years under the name of the Ashbourne Agricultural Company, with a shop in Dublin and a nursery in Dundrum. In 1905 he changed the name of the business at Dundrum to "Alex. Dickson & Sons," and published advertisements for roses and seeds under that name. He had one son, but no partnership in fact existed, and the business at Dundrum was identical with the business in Dublin.

**HELD**—that the plaintiffs were entitled to an injunction restraining the defendant from the use of the name "Alex. Dickson & Sons."

**Turton v. Turton** (1889) 42 Ch. D. 128—C. A.) distinguished.  
**DICKSON v. DICKSON**, [1909] 1 I. R. 185; 43 [I. L. T. 128—C. A., Ireland.]

3. *Similarity of Name—Calculated to Deceive—Secondary Meaning.*—The plaintiff, in 1900, started an advertising business, which he had since carried on under the name or style of the "Trade Extension Co." In 1909 the defendants started a similar business, which was carried on under the name of the "Expansion of Trade (Limited)."

**HELD**—that the plaintiff's trade name had not acquired a secondary meaning as denoting the plaintiff's business, and that the name of the defendant company was not calculated to deceive.

**ELLIOTT v. EXPANSION OF TRADE, LD.**, 54 Sol. [Jo. 101—Eve, J.]

**II. TRADE CUSTOMS.**

[No paragraphs in this vol. of the Digest.]

**III. TRADE COMBINATION.**

[No paragraphs in this vol. of the Digest.]

**IV. RESTRAINT OF TRADE.**

See also No. 17, *infra*; INFANTS, No. 4.

4. *Contract—Public-house—"House"—Words Construed as Limited by the Subject-Matter of Agreement—Construction in Favour of Legal Effect.*—Upon the sale by the defendant to the plaintiff of the defendant's interest in a public-house and premises licensed for the sale of liquors, together with the goodwill, the defendant agreed that she would not "exercise, carry

#### IV. Restraint of Trade—Continued.

on, or be in any manner, directly or indirectly, concerned in any house for the sale of excisable liquors within an agreed distance during the occupancy of the premises by the plaintiff."

HELD—that the word "house" should be construed according to the subject-matter of the agreement as public or licensed house, and not as any premises upon which the sale of liquors might be carried on, and that the clause in agreement was not too wide.

CATTERMOUL v. JARED, 53 Sol. Jo. 244—  
[Neville, J.]

5. *Reasonableness — Newspaper Reporter — Infant—Benefit of Infant.*—A person under the age of twenty-one years entered into the service of the proprietors of a newspaper in a town, where a rival newspaper was established, as a junior reporter at a salary of £2 a week. When he entered the service he signed an agreement that he would not, after leaving the service, be connected as proprietor, employé, or otherwise with any newspaper business carried on in the town or within a radius of twenty miles.

HELD—that the agreement was unreasonable and invalid, as being against public policy.

HELD ALSO, *per* Cozens-Hardy, M.R.—that the agreement was unusual and not for the benefit of the infant, and therefore invalid on that ground also.

Decision of Eve, J. (24 T. L. R. 853; 52 Sol. Jo. 714) reversed.

SIR W. C. LENG & Co. v. ANDREWS, [1909] 1  
[Ch. 763; 78 L. J. Ch. 80; 100 L. T. 7; 25  
T. L. R. 93—C. A.]

6. *Wrongful Dismissal—Right of Servant to Repudiate Contract Totally, including Covenant in Restraint of Trade.*—Where a servant is wrongfully dismissed without his service being terminated by giving the agreed notice, he may treat the contract as entirely at an end, whilst retaining his right to sue his master for wrongful dismissal, and may ignore a covenant in the contract restraining him from trading on the termination of his engagement.

Decision of C. A. ([1908] 1 Ch. 537; 77 L. J. Ch. 411; 98 L. T. 482; 24 T. L. R. 285; 52 Sol. Jo. 240) affirmed.

GENERAL BILL-POSTING CO., LD. v. ATKINSON,  
[[1909] A. C. 118; 78 L. J. Ch. 77; 99  
L. T. 943; 25 T. L. R. 178—H. L.]

7. *Trade Monopoly—Demise of Machines to be Used only with Allied Machines—Breach of Contract by Lessee—Injunction—Damages.*—The appellants, who were the manufacturers of, and had practically a trade monopoly in, certain unpatented machines used for various processes in the manufacture of shoes, leased to the respondents a number of those machines on the terms, *inter alia*, that they should not be used in conjunction with machines not leased to the respondents by the appellants. The appellants also leased to the respondents certain allied

machines whose function was to perform various processes in the manufacture of shoes ancillary to those performed by the machines first mentioned. Subsequently the respondents refused to use the allied machines and used others, which were not leased to them by the appellants, in conjunction with the machines first mentioned. The appellants claimed an injunction to restrain such user and also damages for the breach of contract. The jury found that the appellants had not suffered damage.

HELD—that the leases of the machines were not void as being in restraint of trade; and that the appellants were entitled to an injunction, and also to nominal damages for the breach of contract by the respondents.

UNITED SHOE MACHINERY CO. OF CANADA v.  
[BRUNET AND OTHERS, [1909] A. C. 330; 78  
L. J. P. C. 101; 100 L. T. 578; 25 T. L. R.  
442; 53 Sol. Jo. 396—P. C.]

8. *Agreement Not to Practise as an Architect or Surveyor—Acting as Manager.*—A covenant not to practise a profession is broken by acting as manager to a practising member of that profession.

Palmer v. Mallet (1887) 36 Ch. D. 411—  
C. A.) explained and followed.

ROBERTSON v. WILMOTT, [1909] W. N. 155; 25  
[T. L. R. 681; 53 Sol. Jo. 631—Warrington, J.]

9. *Goodwill—Restriction against Trading—Assignment of Goodwill—Benefit of Agreement.*—

A partnership agreement was entered into by A., B., and C. on December 1st, 1905. By an agreement made between A., B., and C. of the one part and S. of the other part, made on December 2nd, 1905, S. agreed to serve as general manager for ten years from January 1st, 1906, if the partnership should so long exist, and, if that engagement should during such term be terminated in consequence of any breach on the part of S. of any of the terms of engagement towards the firm, S. bound himself not at any time within ten years thereafter and within a radius of twenty miles from Nelson's Column to carry on or be engaged in any business similar to or including the business for which the firm was about to be constituted. S. was dismissed on October 3rd, 1907, for breach of the terms of engagement. The goodwill of the business was assigned to the plaintiff company on November 12th, 1907. The plaintiff company asked for an injunction restraining S. from carrying on business within twenty miles of Nelson's Column. S. alleged that he was not carrying on a similar business, as he did not manufacture, but merely bought from manufacturers. He also said the covenant was a personal one and could not be assigned. On S.'s notepaper he described himself as "Automobile carriage builder. High-class work at moderate price," and he also advertised.

HELD—(1) that S. was carrying on a business similar to and directly competing with the plaintiff company; and (2) that the object of the agreement was to protect the goodwill of the business, and that the benefit passed to the

#### IV. Restraint of Trade—*Continued.*

assignee of the goodwill; and that an injunction as asked should be granted.

AUTOMOBILE CARRIAGE BUILDERS, LD. *v.* [SAYERS, 101 L. T. 419—Eady, J.]

#### V. TRADE UNIONS.

See also DISCOVERY, No. 2; MASTER AND SERVANT, No. 107.

##### (a) Miscellaneous.

10. *Action against Trade Union—Libel—Not in Contemplation or in Furtherance of a Trade Dispute*—*Trade Disputes Act, 1906* (6 Edw. 7, c. 47), s. 4.—The immunity which the legislature has given to trade unions does not extend to tortious acts not committed in furtherance or in contemplation of a trade dispute. Where there is no evidence of any such trade dispute, an action for tort, such as an action for a libel in a newspaper published by a trade union, will lie against the trade union as such.

RICKARDS *v.* BARTRAM AND OTHERS, 25 T. L. R. [181—Darling, J.]

11. *Libel Action against Officials of Trade Union as Individuals—Trade Disputes Act, 1906* (6 Edw. 7, c. 47), ss. 3, 4.—Sects. 3 and 4 of the Trade Disputes Act, 1906, are not in any way available as a defence to a libel action brought against officials of a trade union as individuals and not as defendants on behalf of themselves and of all other members of the trade union.

UNITED COUNTY THEATRES, LD. *v.* DURRANT [AND OTHERS, *Times*, July 6th, 1909—C. A.]

12. *Action of Tort—"Trade Dispute"—"In Contemplation of a Trade Dispute"—Non-payment of Fine to Union—Threat to Employer—Trade Disputes Act, 1906* (6 Edw. 7, c. 47), s. 3.—The words "an act done in contemplation or furtherance of a trade dispute" in sect. 3 of the Trade Disputes Act, 1906, mean that either a trade dispute is imminent and the act is done in expectation and with a view to it, or that the dispute is already existing and the act is done in support of one side to it. In either case the act must be genuinely done as described and the dispute must be a real thing, imminent or existing. The words, however, cannot fairly be confined to an act done by a party to the dispute.

The appellant, who had been a member of a trade union, was during his membership fined a sum of 10s., which he did not pay. He became an employer, and ceased to be a member of the union. Subsequently he ceased to be an employer and rejoined the union, the fine not having been paid. The respondent, who was a delegate of the union, went to the foreman of the appellant's employer and told him that he had better "stop Conway (the appellant), or there will be trouble with the men." The appellant was in consequence dismissed from his employment. In an action against the respondent to recover damages the jury found that there was not a trade dispute existing or contemplated by the men; that the

respondent uttered a threat to the appellant's employer; that what he did prevented or was intended to prevent the appellant from getting or retaining employment; that it was done to compel the appellant to pay, and to punish him for not having paid the fine; that what the respondent did was not done only to warn the appellant's employer that the union men would leave in consequence of their being unwilling to work with the appellant, and that it was not done in consequence of the men objecting to work with him; and that the respondent did something more than act on behalf of the men employed by the appellant's employer.

HELD—that upon these findings the act of the respondent was not done "in contemplation or furtherance of a trade dispute" within the meaning of sect. 3 of the Trade Disputes Act, 1906, and that the respondent was not protected by that section.

Decision of C. A. ([1908] 2 K. B. 844; 78 L. J. K. B. 14; 99 L. T. 634; 24 T. L. R. 874; 52 Sol. Jo. 748) reversed.

CONWAY *v.* WADE, [1909] A. C. 506; 78 L. J. [K. B. 1025; 101 L. T. 248; 25 T. L. R. 779; 53 Sol. Jo. 754—H. L.]

13. *Trade Dispute—Agreement to Refer to Conciliation Committee—Bona fide Belief that Employer had Refused to Refer Dispute—Strike ordered by Branch of Trade Union—Ratification by Central Body—Knowledge of Contracts of Service Broken by Men Called Out.*—In this action, to which the Trade Disputes Act, 1906, was held not to apply, the plaintiff alleged that the defendant trade union had, with other defendants, maliciously induced E. and F., two other defendants, to break their contracts of service with the plaintiff. A branch of the union had "called out" workmen of the plaintiff, including E. and F., and the central body had ratified the act of the branch. E. and F. were at the time under contracts of service for three and five years respectively. Lord Alverstone, C.J., who tried the case without a jury, found as facts, *inter alia*, that the trade union, when the men were called out, were unaware of the existence of E. and F.'s contracts, that the central body, when they ratified the strike, were aware of the existence of these contracts, and that the branch of the trade union acted in a *bona fide* belief that the plaintiff was trying to avoid having a dispute settled in accordance with a previous agreement to refer such disputes to a conciliation committee composed partly of employers and partly of members of the branch of the trade union.

HELD—that, although the branch officials of the trade union were not, as such, officers or agents of the central body, the central body were not exonerated if they in fact ordered or authorised the branch officials to withdraw wrongfully the men from their employment.

*Denaby and Cadeby Main Collieries, Ltd. v. Yorkshire Miners' Association* ([1906] A. C. 384; 75 L. J. K. B. 961; 95 L. T. 561; 22 T. L. R. 543—H. L.) distinguished.

HELD—that the judgment of Lord Collins in



### V. Trade Unions—Continued.

*Read v. Friendly Society of Operative Stonemasons* ([1902] 2 K. B. 732; 71 L. J. K. B. 994; 51 W. R. 115; 87 L. T. 493; 66 J. P. 822; 19 T. L. R. 20—(C. A.)) did not recognise that in circumstances like those in the present case there might be justification for inducing persons to break their contracts; that the agreement to refer disputes did not give to the trade union, in case of a refusal to refer a dispute, an implied power to call out men whom they knew to be under contracts of service; that the knowledge of the men's section of the conciliation committee, who were in fact a committee of the branch of the defendant trade union, that E. and F. were under contracts of service was the knowledge of the branch; and that therefore the defendant trade union was liable.

Decision of Lord Alverstone, C.J. reversed.

*SMITHIES v. NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS AND OTHERS*, [1909] 1 K. B. 310; 78 L. J. K. B. 259; 100 L. T. 172; 25 T. L. R. 205—C. A.

**14. Action Claiming Benefits by Personal Representative of Deceased Member—Trade Union Acts, 1871 (34 & 35 Vict. c. 31), s. 4, and 1876 (39 & 40 Vict. c. 22), s. 10—Provident Nominations and Small Intestacies Act, 1883 (46 & 47 Vict. c. 47), s. 7.]**—Sect. 4 of the Trade Union Act, 1871, which prevents legal proceedings being taken by a member of a trade union on an agreement to pay benefits, applies equally to prevent the personal representative of a deceased member taking such proceedings; and this is not affected by sect. 7 of the Provident Nominations and Small Intestacies Act, 1883.

*RUSSELL v. THE AMALGAMATED SOCIETY OF CARPENTERS AND OTHERS*, 25 T. L. R. 520—Phillimore, J.

#### (b) Rules.

**15. Application of Funds—Representation in Parliament—Supporting Labour Party—Ultra vires—Registration of Rules of Society—Alteration of Rules—Conclusiveness of Registrar's Certificate—Trade Union Acts, 1871 (34 & 35 Vict. c. 31), s. 13; and 1876 (39 & 40 Vict. c. 22), s. 16.]**—The certificate of the Registrar that an alteration in the rules of a trade union has been registered under the Acts is not conclusive as to the validity of such alteration.

It is not competent for a trade union to provide for the maintenance of Parliamentary representation by means of a compulsory levy on its members.

*Per Moulton, L.J.*: By our Constitution, Parliamentary representatives are chosen by votes, and, however little the political views of an elected member may coincide with those of the minority in the constituency, they cannot complain. But that election is the election of a representative, and, whoever be chosen, the right of the minority remains, that he shall be a representative, and not one who has contractually fettered himself in discharge of the duty of a representation which he has accepted as regards the public and not only as regards his own supporters.

*Per Farwell, L.J.*: The primary duty of a member of Parliament is to his country, and he cannot bind himself at law by any promise in abrogation of that duty.

Decision of Neville, J.—(1908) 77 L. J. Ch. 759; 24 T. L. R. 827) reversed.

*OSBORNE v. THE AMALGAMATED SOCIETY OF [RAILWAY SERVANTS]*, [1909] 1 Ch. 163; 78 L. J. Ch. 204; 99 L. T. 945; 25 T. L. R. 107; 53 Sol. Jo. 98—C. A.

Affirmed on appeal, 128 L. T. Jo. 170; *Times*, December 22nd, 1909—H. L.

**16. Inspection of Books by Member—Inspection by Agent—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 14, Sched. I. (6).]**—By the rules of a trade union it was provided that "the books and accounts of the society and list of members shall be open to the inspection of all the members thereof, and of every person having an interest in the funds, in accordance with the Trade Union Acts, on one week's notice being given, on application to the committee."

**HELD**—that the right of inspection so given to members of the society and to those having an interest in its funds might be exercised by means of an agent.

**HELD**, therefore,—that the plaintiffs, members of the society, were entitled to inspection of its books and accounts by an accountant on their behalf, such accountant, however, to give an undertaking not to make use of the information acquired except for the purpose of advising his clients.

*NOREY v. KEEP*, [1909] 1 Ch. 561; 78 L. J. Ch. [334; 100 L. T. 322; 25 T. L. R. 289—Parker, J.

**17. Restraint of Trade—Definition of Trade Union—Defence to Action for Recovery of Fine—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4—Trade Union Act (1871) Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16.]**—In the rules of the defendant society it was stated that the society was a trade union, and that one of its objects was to regulate the relations between employers and workmen. Rule 40, sect. 2, provided that "strike pay will only be paid in support of members endeavouring to secure an advance of wages or resisting a reduction of the same, resisting an increase of the hours of labour and, when desirable, endeavouring to secure a reduction of the same." Sect. 4 provided that in case of a strike members should be entitled to strike pay for six weeks, and continued: "If the strike continue, the strike committee shall be empowered to continue pay for a longer period if they, upon consideration, deem it necessary." No other rule attempted to regulate the relations between employers and workmen.

The plaintiff sued the defendant for the amount of a fine which he said had been illegally imposed upon him, and the defence was raised that, the defendant society being a trade union, the action was not maintainable by reason of the Trade Union Act, 1871, s. 4.

**HELD**—that the objects, generally, of the society were not illegal, that the rules merely

### V. Trade Unions—Continued.

insured members against the results of a strike, that they were not in restraint of trade so as to render the society illegal, and that the action was therefore maintainable.

Decision of Div. Ct. (99 L. T. 616; 24 T. L. R. 814) reversed.

GOZNEY *v.* BRISTOL, WEST OF ENGLAND AND [SOUTH WALES OPERATIVES' TRADE AND PROVIDENT SOCIETY, [1909] 1 K. B. 901; 78 L. J. K. B. 616; 100 L. T. 669; 25 T. L. R. 370; 53 Sol. Jo. 341—C. A.

**18. Title to Sue—Secession of Branch—Resolution to Distribute Funds Amongst Members—Action to Restrain Misapplication of Funds—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4.]**—An action by the trustees of a trade union to restrain the misapplication of the funds of a branch of the trade union by the trustees of the branch is maintainable, notwithstanding sect. 4 of the Trade Union Act, 1871.

The Court made a declaration that a resolution of a seceding branch of the trade union to distribute the funds of the branch among the members of the branch was *ultra vires* the rules of the trade union, and granted an injunction restraining the branch trustees from making such distribution of the branch funds or from dealing with the same otherwise than in accordance with the rules.

Decision of Eve, J. ([1908] 2 Ch. 624; 77 L. J. Ch. 777; 99 L. T. 609; 24 T. L. R. 816; 52 Sol. Jo. 683) varied.

COPE *v.* CROSSINGHAM, [1909] 2 Ch. 148; 78 [L. J. Ch. 615; 100 L. T. 945; 25 T. L. R. 593; 53 Sol. Jo. 559—C. A.

### (c) Conspiracy.

**19. Appeal from Ontario—Actionable Conspiracy—Resolution of Union calling a Strike—Misdirection.]**—The respondents sued the appellants (who represented the members of a trade union), alleging that they had conspired to injure the respondents in the conduct of their business, and that in pursuance of the conspiracy the union caused the respondents' men to go out on strike. The Judge in effect directed the jury that if the resolution of the union calling out the plaintiffs' men was the cause of the strike that was an actionable wrong, without regard to the motive and without regard to the conspiracy alleged.

HELD—that this direction could not be supported and that there must be a new trial.

Decision of the C. A. for Ontario reversed.

JOSE *v.* METALLIC ROOFING CO. OF CANADA, [LD., [1908] A. C. 514; 78 L. J. P. C. 36; 99 L. T. 742; 24 T. L. R. 878—P. C.

### (d) Offences.

**20. Peaceful Picketing—Evidence of Previous Acts—Picketing a Theatre—Trades Disputes Act, 1906 (6 Edw. 7, c. 47), s. 2—Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 88).]**—In a prosecution for "wrongfully and without legal authority besetting,"

where the intention of the defendants is in question, the justices are entitled to receive and act upon evidence of previous acts of the accused. The justices should consider the character of the meeting and all the circumstances of the case, and determine whether the parties were acting merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

*Quære*—Whether peacefully picketing a theatre for the purpose of persuading members of the public from attending the performances is within the exception contained in the Trades Disputes Act, 1906, sect. 2, which authorises picketing for the purpose of "persuading any person to work or abstain from working."

TOPPIN *v.* FERON AND OTHERS, 43 I. L. T. 190 [—Div. Ct., Ireland.

## TRADE MARKS AND DESIGNS.

COL,

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### I. REGISTRATION.

#### (1) Application.

**1. Distinctive Mark—“Oswego” Corn Flour—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9, sub-s. 5.]**—The proprietors of a well-known preparation of corn flour, which had for many years been known in this country as Oswego Prepared Corn or Oswego Corn Flour, applied under sect. 9, sub-sect. 5, of the Trade Marks Act, 1905, for the registration of the word “Oswego” alone as their trade mark for corn flour or prepared corn

### 1. Registration—Continued.

for use as food in class 42. The evidence showed that their preparation had been upon the market for 60 years, and that the word "Oswego" in connection with corn flour denoted their preparation.

HELD—that "Oswego" was a "distinctive mark" in respect of corn flour within the meaning of sect. 9, sub-sect. 5.

IN RE NATIONAL STARCH CO.'S APPLICATION [FOR THE REGISTRATION OF A TRADE MARK, [1908] 2 Ch. 698; 78 L. J. Ch. 34; 99 L. T. 724; 25 T. L. R. 13; 53 Sol. Jo. 13; 25 R. P. C. 802; 21 Cox, C. C. 712—Warrington, J.

2. "Distinctive Mark"—"Royal Worcester" Corsets—"Royal"—Suggestion of Royal Patronage—Power of Board of Trade to Direct Service of Application on Persons other than Comptroller—Trade Mark Rules, 1906, r. 39—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9 (5), (11).—An application by the Royal Worcester Corset Company, of Worcester, Massachusetts, for registration of the words "Royal Worcester" as a trade mark in connection with corsets was refused on the grounds that the words were not in themselves distinctive words within the meaning of sect. 9 (5) of the Trade Marks Act, 1905; that there was no evidence that apart from additional words indicating that the corsets were made in America, they had become distinctive by user; and that the word "Royal" suggested Royal patronage, which it was not alleged that the applicants enjoyed.

Whatever may be the strict powers of the Board of Trade under rule 39 of the Trade Mark Rules, 1906, in requiring an application to Court by the applicant for the registration of a trade mark under sect. 9 (5) of the Trade Marks Act, 1905, to order service of the application on persons other than the Comptroller, it is a convenient practice for the Board to indicate upon whom, in their opinion, the application should be served. If the applicant does not serve the persons indicated by the Board, the Court may, if it thinks fit, proceed without such service, or it may direct service to be made according to its own view of what the circumstances require.

IN RE ROYAL WORCESTER CORSET CO.'S [APPLICATION TO REGISTER A TRADE MARK, [1909] 1 Ch. 459; 78 L. J. Ch. 309; 100 L. T. 235; 25 T. L. R. 241; 26 R. P. C. 185—Parker, J.

3. "Distinctive Mark"—Name of Well-known Physician—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9, sub-s. 5.—From the year 1881 the applicants, who were manufacturers, used, with his consent, the name of a well-known physician as a trade mark for a class of bedsteads which they made and sold, they paying to the physician a royalty on every bedstead sold down to his death in 1899, and afterwards to his widow. The name was only used in connection with these particular bedsteads, and no others.

HELD—that the name was a "distinctive mark" within the meaning of sect. 9, sub-sect. 5

of the Trade Marks Act, 1905, and ought to be registered.

IN RE AN APPLICATION OF WHITFIELD'S [BEDSTEADS, LD., FOR REGISTRATION OF A TRADE MARK. [1909] 2 Ch. 373; 78 L. J. Ch. 677; 101 L. T. 29; 53 Sol. Jo. 598; 26 R. P. C. 657—Eve, J.

4. Similar Mark Already on Register—Different Class—"Same Description of Goods"—Calculated to Deceive—Trade Marks Act, 1905 (5 Edw. 7, c. 15), ss. 11, 19.—A company applied for the registration in Class 38 of the Maltese cross surrounded by certain words in respect of two trade marks, one for indiarubber boots and shoes, and the other for indiarubber footwear not including gaiters or goods of a like kind. The application was opposed by an English company who had already a Maltese cross on the register in Class 40 for indiarubber and gutta-percha goods not included in other classes, but not including dress shields or goods of a like kind. The opposition was founded on the ground that the goods for which the applicants sought registration were the same description of goods as those in which the opponents traded; and that the registration and use of a Maltese cross would be "calculated to deceive" within the meaning of sect. 11 of the Trade Marks Act, 1905.

HELD—that the case fell within sect. 19 of the Trade Marks Act, 1905, which gave increased protection to a trade mark already on the register; and that if the Court were satisfied, as in the present case, that goods, although in different classes, were really the "same description of goods," the opponents were entitled to claim the benefit of sect. 19.

Decision of Neville, J. (26 R. P. C. 84) affirmed. IN RE GUTTA PERCHA AND INDIA RUBBER [CO. OF TORONTO'S APPLICATIONS, [1909] 2 Ch. 10; 78 L. J. Ch. 427; 100 L. T. 756; 26 R. P. C. 428—C. A.

### (2) Invented or Descriptive Name: Secondary Meaning.

5. Descriptive Name—Distinctive Name—"Slip-on"—Coats and Overcoats—Application for Injunction to Restrain Use of Name.—A word, such as "slip-on" as applied to overcoats, may be at the same time both descriptive and distinctive, but the fact that it retains its *primâ facie* descriptive signification increases the difficulty of proving that it is distinctive of the goods of any particular manufacture. If a word is *primâ facie* the name of or description of an article, evidence that it is also generally associated with the name of a particular manufacture is not conclusive that it has become a distinctive word which cannot be used of the same article when made by others without risk of deception.

BURBERRYS v. J. C. CORDING & CO. LD., 100 [L. T. 985; 25 T. L. R. 576; 26 R. P. C. 693—Parker, J.

6. "Distinctive Mark"—Geographical Name—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9,



### I. Registration—Continued.

*sub-ss.* 4, 5.]—The applicants, who carried on business at San Francisco as the California Fig Syrup Company, introduced a medicinal preparation into this country some twelve or thirteen years ago, and this preparation had been continuously sold here under the name "California Syrup of Figs." The name was on the bottles in which the preparation was sold, and it was used in the advertisements which had been extensively issued by the applicants. The name "California Syrup of Figs" did at the present time distinguish the manufacture of the applicants from other preparations of similar manufacture in this country.

**HELD**—that, without saying that the mark was distinctive or that it ought to be registered, the applicants should not be precluded from endeavouring to obtain registration of the mark.

Decision of Warrington, J. ([1909] 2 Ch. 99; 78 L. J. Ch. 515; 100 L. T. 875; 25 T. L. R. 539; 26 R. P. C. 436) reversed.

**IN RE CALIFORNIA FIG SYRUP CO.'S APPLICATION**, [1909] W. N. 233; 101 L. T. 587; 26 T. L. R. 100; 54 Sol. Jo. 100—C. A.

7. "*Distinctive Mark*"—*Laudatory Epithet*—"*Perfection*"—*User—Trade Marks Act, 1905* (5 Edw. 7, c. 15), s. 9.]—An ordinary laudatory epithet is not adapted to distinguish goods of a particular proprietor, and therefore is not capable of being registered as a trade mark. Whether in any particular case the word is or is not something more than a laudatory epithet is for the tribunal to decide. If it is open to doubt, the tribunal, that is, in the first place, the Board of Trade, whose preliminary order is necessary, may direct the application for registration to proceed; but if the tribunal is satisfied that the word is purely laudatory, the application ought not to be allowed to proceed, and if the application has been allowed to proceed it ought to be refused at the second stage.

Such words as "good," "best," "perfection," cannot be distinctive marks within sect. 9 (5) of the Trade Marks Act, 1905, notwithstanding long user of such a word in connection with the applicant's soap.

Decision of Eady, J. ([1909] W. N. 147; 25 T. L. R. 643; 26 R. P. C. 561) affirmed.

**IN RE JOSEPH CROSFIELD & SONS, LD.'S APPLICATION**, [1909] W. N. 233; 101 L. T. 587; 26 T. L. R. 100; 54 Sol. Jo. 100—C. A.

8. "*Orlwoola*"—*Words Misspelt—Not Registrable—Rectification of Register—Trade Marks Act, 1905* (5 Edw. 7, c. 15), ss. 9, 35, 36, 44.]—A word, not being an invented word, ought not to be put on the register if its spelling is phonetic and it resembles in sound a word which when properly spelled could not be put on the register.

In 1899 and 1900 the respondents' predecessors in business registered the word "Orlwoola" as a trade mark under the Patents, Designs, and Trade Marks Act, 1888, and the mark had ever since been continuously used by the respondents, and had become identified with a woollen material manufactured by them. There was no

evidence that the registration of the mark had caused any deception or given rise to any confusion or inflicted any hardship upon other traders. The applicants asked for the register to be rectified by the expunging of the mark. The respondents had disclaimed the words "all wool."

**HELD**—that the word "Orlwoola" was not an "invented word" under the Patents, Designs, and Trade Marks Act, 1888, or the Trade Marks Act, 1905, that it was not registrable under the Act of 1905 as a "distinctive mark," and that it must be expunged from the register.

Decision of Eve, J. (25 T. L. R. 695; 53 Sol. Jo. 672; 26 R. P. C. 681) reversed.

**IN RE H. N. BROCK & CO., LD.**, [1909] W. N. [233; 101 L. T. 587; *sub nom.* **IN RE TRADE MARKS** Nos. 224722, 230405, and 230407, 26 T. L. R. 100; 54 Sol. Jo. 100—C. A.

### (3) Alteration and Rectification.

*See* No. 8, *supra*.

### II. DECEPTION.

*See also* Nos. 2, 4, *supra*; **TRADE AND TRADE UNIONS**, Nos. 1, 2, 3.

#### (1) By use of Same Trade Name.

9. *Chartreuse—Passing off—French Law of Associations—Transfer of Business to Official Liquidator—Business in France—Business Outside France—English Trade Marks.*]—A liqueur, known as "Chartreuse," had been manufactured at a distillery near the monastery of La Grande Chartreuse, in France, by monks of the Carthusian Order, according to a secret process, since 1850. In 1876 the monks registered, among others, as a trade mark in England a label which bore the words "Liquore fabriquée à la Grande Chartreuse," and had on it the device of the order, in the name of Louis Garnier, then procurateur of the monastery. In 1903 the monks of the monastery were expelled from France, and the French Courts declared that their property business, goodwill, and trade marks became vested in an official liquidator under the French Law of Associations of 1901. Some of the expelled monks went to Tarragona, in Spain, where, under an agreement with a Spanish company, the manufacture of their liqueur was carried on under their superintendence. The liquidator, by his agents, proceeded to make a similar liqueur to that of the monks at the distillery of the monastery and to sell it in England under the name "Chartreuse," and on the faith of the French judgments the Comptroller placed the name of the liquidator upon the register in respect of the above trade mark in lieu of that of Rey, then procurateur of the order. Upon action by the representative of the Carthusian Order and others to restrain the liquidator and his agents from using the word "Chartreuse" and passing off their liqueur as that of the plaintiffs, and upon motion for the rectification of the register:—

**HELD**—that the word "Chartreuse" had prior to the year 1903 acquired in the English liqueur

### II. Deception—Continued.

market the secondary meaning of a liqueur made by the monks of La Grande Chartreuse; that the French judgments did not affect the goodwill or the trade marks of the business carried on by the monks outside France; that the defendants were passing off their liqueur as the old liqueur made by the monks; and that the plaintiffs were entitled to an injunction to restrain the defendants from using the word "Chartreuse" as the name of their liqueur and from passing off their liqueur as that made by the plaintiffs, and that the entry in the register must be struck out.

REY v. LECOUTURIER, [1908] 2 Ch. 715; 78 [L. J. Ch. 181; 98 L. T. 197; 25 R. P. C. 265—C. A.]

#### (2) By Colourable Imitation of Name.

[No paragraphs in this vol. of the Digest.]

#### (3) By Colourable Imitation of Label, Design, or Get-up.

[No paragraphs in this vol. of the Digest.]

### III. CONDUCT FACILITATING DECEPTION.

[No paragraphs in this vol. of the Digest.]

### IV. MISREPRESENTATIONS BY ADVERTISING, etc.

[No paragraphs in this vol. of the Digest.]

### V. FALSE TRADE DESCRIPTION: MERCHANDISE MARKS ACT, 1887.

10. *Exemption in Case of Description Applied in 1887 to Goods of a Particular Class—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), ss. 2, 3, 18.*—Where cigars made in this country, but partly composed of Havana tobacco, are sold in boxes with Spanish names and pictures upon them similar to those containing Havana cigars made and grown in Cuba, they are not sold under a trade description lawfully and generally applied in 1887 to goods of a particular class to indicate the particular class within the meaning of sect. 18 of the Merchandise Marks Act, 1887, although such British cigars were sold in 1887 in boxes with similar, but not the same, names and pictures upon them.

On these facts, therefore, a conviction under sect. 2, sub-sect. 2, of the Merchandise Marks Act, 1887, for selling two boxes of cigars to which a false trade description was applied, was upheld, the Court holding that the exemption under sect. 18 of the Act had no application to the case, and supporting the direction of the learned Judge who tried the case, to the effect that sect. 18 was intended to protect one particular trade description, which was like a trade mark, attached to a particular class of goods.

R. v. BUTCHER, 99 L. T. 622; 72 J. P. 454; 24 [T. L. R. 797; 52 Sol. Jo. 716; 21 Cox. C. C. 697—C. C. A.]

11. *British-made Cigars—Get-up of Box—Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), ss. 2, 3.*—The defendants were convicted under sect. 2 of the Merchandise Marks Act, 1887, for selling, and having in their possession for sale, cigars to which a false trade description was applied.

HELD, on appeal—that there was evidence upon which the jury were entitled to come to the conclusion that the defendants had applied a false trade description to the cigars and that it could not be said that the jury acted unreasonably in saying that the defendants had not proved within the meaning of sect. 2 (2)(c) of the Act that they "otherwise had acted innocently."

REX v. JOSEPH PHILLIPS; REX v. PHILIP [PHILLIPS; REX v. DAVID PHILLIPS, 73 J. P. 458; 25 T. L. R. 764—C. C. A.]

### VI. PRACTICE.

#### 1. In General.

12. *Appeal from Registrar—Leave to Adduce Further Evidence—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 14 (7).*—On appeal from the refusal of the Registrar of Trade Marks to register the applicant's trade mark, the Court gave leave to adduce further evidence.

IN RE OGSTON AND TENANT, LD., 26 T. L. R. [40—Joyce, J.]

13. *Pleading—Infringement of Trade Mark—Defence—Particulars of Alleged Invalidity.*—There are no rules of pleading peculiar to actions for infringement of trade marks, and in defence to such an action particulars of alleged invalidity must be given.

Rowland v. Michell ((1896) 13 R. P. C. 457—Romer, J.) followed.

GROSVENOR CHEMICAL CO. v. GREENFIELD, [[1909] 1 I. R. 32—Meredith, M.R., Ireland.]

#### 2. Costs.

14. *Use of Royal Arms—Injunction—Motion in Court—Costs—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 68.*—On a motion in Court for an injunction under sect. 68 of the Trade Marks Act, 1905, to restrain the unauthorised use of the Royal Arms and the words "By Royal Appointment," the defendants consented to a perpetual injunction and to an order for delivery up after a certain time of all documents in their possession bearing the said arms or words, and it was agreed that the hearing should be treated as the trial of the action. On the question whether the defendants should pay the costs other than would have been incurred if the matter had been heard in chambers,

HELD—that the plaintiffs were quite justified in moving in Court and that the defendants, as they had agreed to treat the hearing as the trial of the action, which could not have been done in chambers, must pay the ordinary costs.

ROYAL WARRANT HOLDERS' ASSOCIATION v. [E. J. KITSON, LD., Times, January 23rd, 1909—Eady, J.]

#### 3. Trifling Offences.

[No paragraphs in this vol. of the Digest.]

### VII. MISCELLANEOUS CASES.

15. *Trade Mark—Assignment of Trade Mark—Breach of Trade Mark—Title to Damages.*—



## VII. Miscellaneous Cases—Continued.

The plaintiffs sued for infringement of trade marks in respect of watches. Upon it being shown that the business of selling watches in Hong Kong affected thereby did not belong to the plaintiffs and was not carried on for their benefit, but that they merely manufactured and supplied to it the watches sold :—

HELD—that the plaintiffs could not maintain the action.

ULLMANN & Co. v. CESAR LEUBA, [1908] A. C. [443; 78 L. J. P. C. 41; 99 L. T. 531; 25 R. P. C. 673—P. C.

**16. Innocent Infringer—Consent to Perpetual Injunction—Right to Account of Profits or Damages.**—The Trade Marks Acts have not altered the principle laid down in *Edelsten v. Edelsten* ((1863) 1 De G. J. & S. 185), and the registered proprietor of a trade mark is not entitled to an account of profits or damages against an innocent infringer, but only to an injunction.

SLAZENGER AND SONS v. SPALDING BROS., [1909] W. N. 261—Neville, J.

expense of the following works is not recoverable :  
(c) Laying down a new service pipe for the first time since the construction of the tramway;  
(d) repairing, altering, or removing a service pipe laid since the tramway was constructed, the main having been laid before the construction of the tramway.

Decision of Phillimore, J., on these points ([1909] 2 K. B. 297; 78 L. J. K. B. 772; 100 L. T. 909; 73 J. P. 323; 7 L. G. R. 693) affirmed.

*Semble*, the expression “such work” in subsect. 5 of sect. 32 means work whereby the traffic on the tramway is interrupted.

IN RE BRISTOL GAS CO. AND BRISTOL TRAMWAYS AND CARRIAGE CO., LD., [1909] W. N. 223; 101 L. T. 659; 26 T. L. R. 75; 54 Sol. Jo. 47—C. A.

**2. Snow, Clearing Away—Duty of Company—“Maintain and Keep in Good Condition and Repair”**—*Removal of Snow—Tramways Act, 1870* (33 & 34 Vict. c. 78), s. 28.]—Sect. 28 of the Tramways Act, 1870, does not impose upon a tramway company the duty of removing snow from their tramway, when it does not cause an obstruction to passengers.

HELD ALSO, upon the facts—that the defendant company had not by their use of a snow-plough created a nuisance causing peculiar damage to the plaintiff authority.

ACTON DISTRICT COUNCIL v. LONDON UNITED [TRAMWAYS, [1909] 1 K. B. 68; 78 L. J. K. B. 78; 100 L. T. 80; 73 J. P. 6; 7 L. G. R. 20; 53 Sol. Jo. 62—Div. Ct.

**3. Repairs—Satisfaction of Road Authority—Arbitration—Jurisdiction of Magistrate—Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 28, 33.]—The private Acts of a tramway company incorporated sects. 28 and 33 of the Tramways Act, 1870, and imposed on the company a penalty (1) for non-compliance with sect. 28, (2) for not keeping the tramways in repair to the satisfaction of the road authority, and (3) for not keeping the rails in repair and so as not to be a danger or annoyance to the ordinary traffic.**

The tramway company were summoned (1) for not keeping in repair, with such materials and in such manner as the road authority had directed, the portion of the road prescribed by sect. 28 of the Tramways Act, 1870, (2) for not keeping their tramways in repair to the satisfaction of the road authority, and (3) for not keeping the rails in repair and so as not to be a danger or annoyance to the ordinary traffic.

HELD—that the obligation to keep in repair certain parts of the roads which is imposed by sect. 28 of the Tramways Act, 1870, and the obligation imposed by the company's private Acts to keep the tramways in repair to the satisfaction of the road authority, was in each case an obligation to keep in repair, not to the satisfaction of the road authority absolutely, but to their reasonable satisfaction, and that the question whether the road authority ought reasonably to be satisfied must go to arbitration

## TRAMWAYS AND LIGHT RAILWAYS.

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See also DEPENDENCIES, No. 32; RATES, Nos. 2, 3; SOLICITORS, No. 7.

### I. BYE-LAWS.

[No paragraphs in this vol. of the Digest.]

### II. CONSTRUCTION AND MAINTENANCE.

**1. Gas Mains and Pipes—Laying Down, Repairing, etc.—Additional Expense Incurred by Reason of Existence of Tramway—New Pipes—Interruption of Tramway—Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 32.]—An interruption of tramway traffic within the meaning of sect. 32, subsect. 2, of the Tramways Act, 1870, is caused when in the case of a double line both up and down traffic has to be carried on a single line, or when tramcars are slowed down or brought to a standstill for a sufficient time to enable workmen to get out of trenches under or near the tramlines.**

The additional expense of the following works is recoverable from the promoters under sect. 32 of the Act of 1870 : (a) Connecting a new service pipe laid for the first time since the construction of the tramway with a main laid before the construction of the tramway, such connection being an alteration of the main : (b) repairing, altering, or removing a service pipe or a main laid before the tramway was constructed. The additional



## II. Construction and Maintenance—Continued.

under sect. 33 of the Tramways Act, 1870, and was one with which the magistrate had no jurisdiction to deal, but that the magistrate had jurisdiction to deal with the summonses for not keeping the rails in repair, as in this instance no question had arisen in regard to the satisfaction of the road authority.

R. v. GARRETT AND HAMMERSMITH BOROUGH [COUNCIL, EX PARTE LONDON UNITED TRAMWAYS, LD., 100 L. T. 533; 73 J. P. 188; 7 L. G. R. 541—Div. Ct.

## III. PURCHASE BY LOCAL AUTHORITY.

4. *Statutory Company—Time Limit for Completion of Works—Incomplete Undertaking Sold to London County Council—Whether Undertaking "Abandoned" by Company—Parliamentary Deposits—The Peckham and East Dulwich Tramways Act, 1882 (45 & 46 Vict. c. cxxiii.), ss. 4, 6, 7, 36—The Peckham and East Dulwich Tramways (Extensions) Act, 1883 (46 & 47 Vict. c. cxxvii.), ss. 19, 22, 23—The Peckham and East Dulwich Tramways Act, 1885 (48 & 49 Vict. c. cxcix.), ss. 5, 24, 25—The Peckham and East Dulwich Tramways Act, 1887 (50 & 51 Vict. c. clxxxiii.), ss. 6, 13—The Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), s. 1—The London County Council (Tramways and Improvements) Act, 1904 (4 Edw. 7, c. cxxxi.), ss. 5, 9, 10.]—A statutory company was authorised by its special Acts of 1882 and 1883 to construct certain tramways. In particular by an Act of 1885 it was empowered to lay a tramway in Rye Lane, Camberwell, with the proviso that no part of such tramway should be constructed until Rye Lane had been widened to the satisfaction of the local and road authorities; and by a special Act of 1887 the time limited by the Act of 1885 for completing the tramway in Rye Lane was extended until the expiration of one year after that lane had been widened. In 1904 Rye Lane had not been widened, and the London County Council under the powers of their special Act of that year (which authorised them to widen Rye Lane and to lay a tramway therein) acquired the incomplete undertaking of the company. On an application by a creditor of the company that the parliamentary deposits in Court under the Acts of 1882, 1883, and 1885, might be applied for the benefit of its creditors:—*

HELD—(1) that the words "the undertaking has not been completed" in sect. 1 of the Parliamentary Deposits and Bonds Act, 1892, must be read to mean completion by the company; (2) that the company by transferring its undertaking to the London County Council had put an end to its time limit, and had also "abandoned" its undertaking; and, therefore, (3) that the applicant was entitled to an order.

IN RE PECKHAM, EAST DULWICH AND CRYSTAL [PALACE TRAMWAYS BILL, [1909] 2 Ch. 540; 78 L. J. Ch. 726; 101 L. T. 226; 73 J. P. 409—Neville, J.

## IV. MISCELLANEOUS.

5. *Accident—Limit of Liability—Breach of Statutory Duty—Alternative Rate—Duty of Tramway Authority to Carry Passengers.*—While proceeding to a seat on the roof of one of the defendants' tramcars, the plaintiff was injured through coming in contact with a standard which was electrically charged owing to a defect which constituted a breach of statutory regulations made by the Board of Trade. At the time the accident happened the plaintiff had not taken his ticket or paid his fare. He knew that a special notice to passengers in the following terms was exhibited in the tramcar:—"Special Notice to Passengers.—Passengers are being carried at less than the maximum authorised charges, and every passenger is notified that in consideration thereof a passenger is only carried on the terms that the maximum amount recoverable from the corporation on account of any injury or damages suffered by a passenger and for which the corporation is legally liable is £25. Except as above every passenger travels at his own risk. Passengers can only travel subject to being bound to observe the by-laws for the time being." The maximum toll which the defendants were entitled to demand could not exceed 1d. per mile; they, in fact, had a toll which they exacted from all passengers alike of less than 1d. per mile, and these tolls they exhibited inside each of their tramcars. They did not offer any alternative to the tolls which they charged. The jury assessed the damages sustained by the plaintiff at £500.

HELD (by Cozens-Hardy, M.R., upon the construction of the statutes regulating the tramway; by Farwell, L.J., upon the ground that the corporation were common carriers of passengers at common law in the sense that they were bound to carry according to their profession; and by Kennedy, L.J., upon both grounds)—that, so long as the tramway was open for public traffic the corporation were bound to carry any passenger, not being an objectionable person, who offered himself and was willing to pay the published fare, provided they had accommodation for him, and were not entitled to impose a condition limiting their liability for negligence without giving the passenger the option of travelling at a higher fare without any such condition.

*Semle, per Cozens-Hardy, M.R., and Farwell, L.J.*: If the corporation published alternative lists of fares, one containing the maximum rates, and the other containing reduced rates, and gave an option to the passenger to pay either the full rate without any condition limiting their liability or the reduced rate with such a condition, a passenger electing to pay the smaller rate would be bound by the condition.

Decision of Lord Coleridge, J. (73 J. P. 315; 25 T. L. R. 516) affirmed.

CLARKE v. WEST HAM CORPORATION, [1909] 2 K. B. 858; 101 L. T. 481; 73 J. P. 461; 25 T. L. R. 805; 53 Sol. Jo. 731; 7 L. G. R. 1118—C.A.

IV. **Miscellaneous—Continued.**

6. *Tramways Constructed by Corporation—Lease to Company—Provision for Penalties—Arbitration Clause—Devonport Corporation (General Powers) Act, 1902* (2 Edw. 7. c. cxxiv.), s. 13.]

By an agreement made between a corporation and a tramway company, and scheduled to a local Act, it was agreed that the corporation should construct certain authorised tramways and lease them to the company. The agreement provided that the company should be liable to a penalty, to be recoverable summarily, if they did not give such a service as the corporation might reasonably require in the public interests. The Act ratified the agreement and provided that "Any penalty under the said agreement may be recovered in manner provided by the Summary Jurisdiction Acts." The corporation then constructed the tramways and leased them to the company by a lease which provided that if the company did not give such a service as might be reasonably required by the corporation the company should be liable to a penalty, and that if any difference should arise between the corporation and the company it should be determined by an arbitrator appointed by the Board of Trade. The corporation summoned the tramway company for penalties for failure to provide a sufficient service as required by the lease.

**HELD** (Lawrence, J., dissenting)—that the words of the local Act "Any penalty under the said agreement" included a penalty under the lease, and that although the agreement was now merged in the lease, the penalties were recoverable summarily if there had been the failure alleged.

**HELD ALSO**, on the facts—that as the company had not alleged the existence of any difference, no difference had arisen between the company and the corporation so as to make the provision for arbitration applicable, and that therefore the jurisdiction of the magistrates was not ousted.

**R. v. DEVONPORT JUSTICES AND OTHERS, EX PARTE DEVONPORT TRAMWAYS CO.**, 101 L. T. 424; 73 J. P. 393; 7 L. G. R. 1028—Div. Ct.

**TRANSVAAL.**

*See* DEPENDENCIES AND COLONIES.

**TREASON.**

*See* CRIMINAL LAW AND PROCEDURE.

**TREASURE TROVE.**

*See* CROWN PRACTICE.

**TRESPASS.**

*See also* ANIMALS, No. 13; EXECUTION, No. 2; GAME; NEGLIGENCE, Nos. 8, 9, 10; RAILWAYS, No. 33.

1. *False Imprisonment—Railway—Special Constables—Liability of Railway.*—Special constables employed by a railway under the authority of an Act of Parliament are servants of the railway company and not of the Crown, and in the event of their making an arrest without reasonable cause the railway company, as their employer, is liable to an action for false imprisonment.

**LAMBERT v. GREAT EASTERN RY. CO.**, [1909] 2 K. B. 776; 101 L. T. 408; 73 J. P. 445; 25 T. L. R. 734; 53 Sol. Jo. 732—C. A.

2. *Trespass to the Person—Assault and False Imprisonment—Passenger Prevented from Leaving Ferry Company's Wharf without Payment—Notice of Conditions of Carriage—New South Wales.*—The appellant entered the respondents' wharf for the purpose of using their ferry and paid the fare, 1d., at the turnstile. Wishing to leave the wharf without using the ferry, he refused to pay a second 1d. demanded on going out again by the turnstile. He endeavoured to get out without paying the 1d. and was prevented by the respondents' servants. In consequence he sued the respondents for damages for assault and false imprisonment. A notice board on the wharf announced that 1d. must be paid on entering or leaving the wharf and that no exception would be made to the rule whether the passenger had travelled by the ferry or not.

**HELD**—that the respondents were not bound to provide a gratuitous exit from their wharf, that the respondents' servants were entitled to resist the appellant's forcible passage from their premises by an unauthorised way, and that as no undue violence had been used the appellant was not entitled to recover.

Decision of the High Court of Australia (4 C. L. R. 379) affirmed.

**ROBERTSON v. BALMAIN NEW FERRY CO., LD.**, [26 T. L. R. 143—P. C.]

3. *Trespass to the Person—Prisoner—Forcible Feeding—Duty of Prison Officials.*—It is the duty of prison officials to preserve the health of the prisoners in their custody, and *à fortiori* to preserve their lives, and it is for the jury to say whether the means adopted by those officials, for example, the feeding of a prisoner by force, are necessary for that purpose.

**LEIGH v. GLADSTONE AND OTHERS**, 26 T. L. R. [139—Lord Alverstone, C.J.]

**TRIAL.**

*See* CRIMINAL LAW AND PROCEDURE; PRACTICE AND PROCEDURE.

**TRINIDAD.**

*See* DEPENDENCIES AND COLONIES.

**TROVER AND CONVERSION.**

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**TRUCK ACTS.**

*See* MASTER AND SERVANT; WORK AND LABOUR.

**TRUSTS AND TRUSTEES.**

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*See also* BANKERS, No. 1; BANKRUPTCY, Nos. 20, 31, 32; CHARITIES; COMPANIES, Nos. 9, 10; DEATH DUTIES, Nos. 2, 5; DEEDS, No. 1; EDUCATION, No. 7; EXECUTORS; MORTGAGES; PRACTICE; POWERS; SALE OF LAND; SETTLEMENTS; WILLS.

**I. IN GENERAL.**

[No paragraphs in this vol. of the Digest.]

**II. ACCOUNTS.**

[No paragraphs in this vol. of the Digest.]

**III. APPOINTMENT OF TRUSTEES.**

*See also* BANKRUPTCY, No. 27; EXECUTORS, No. 27.

1. *Power to Appoint New Trustees—Tenant for Life Donee of Power—Death of Last Surviving Trustee—His Executors acting as Trustees—Tenant for Life appointing New Trustees—Validity of Appointment—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30 (1)—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 10, 25.*—For three years after the death of a last surviving trustee his executors acted as trustees, taking possession of the settled property,

collecting the rents, and accounting to the life tenant.

The life tenant and her husband, who had power under the settlement to appoint new trustees, then appointed two new trustees by a deed containing the usual vesting declaration.

**HELD**—that the appointment was valid, and that the new trustees were entitled to have all the trust deeds and documents handed over to them.

**IN RE ROUTLEDGE'S TRUSTS, ROUTLEDGE v. [SAUL, [1909] 1 Ch. 280; 78 L. J. Ch. 136; 99 L. T. 919—Neville, J.]**

2. *Public Trustee—Special Circumstances—Reasons for not Appointing—Public Trustee Act, 1906 (6 Edw. 7, c. 55).*—Where a settlement is evidently designed to protect the settlor against himself, and it is very doubtful whether the settlor would have consented to make the settlement if the trustee suggested had been a public official, trustees desiring to retire, although they can appoint the Public Trustee, should, if the settlor resists such appointment, try to find some member of the family to accept the trust before resorting to the Public Trustee Act, 1906, and appointing the Public Trustee in their place.

**IN RE HOPE - JOHNSTONE'S SETTLEMENT [TRUSTS, 25 T. L. R. 369—Parker, J.]**

**IV. BREACH OF TRUST.**

*See also* BANKRUPTCY, No. 27.

3. *Statute of Limitations—Acknowledgment of Debt—Entries in Books of Account of Firm of Solicitors—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 8 (1) (b).*—In an action against trustees for breach of trust the defendants pleaded the Statute of Limitations and sect. 8 of the Trustee Act, 1888. The plaintiffs relied upon entries in the books of the solicitor (since deceased) who acted for the trustees, showing payments of interest on the funds sought to be recovered in the action. The books in which the entries were made were not the books of the solicitor himself, but were the books of the firm of which he was a partner.

**HELD**—that these books were not admissible in evidence as entries by a deceased person against interest.

**HELD ALSO**—that an admission by the trustees of the existence of moneys uninvested in their hands was not an admission for the benefit of the tenant for life, and that the trustees were entitled to rely as against such tenant for life on the Statute of Limitations, having regard to sect. 8 of the Trustee Act, 1888.

**IN RE FOUNTAINE, IN RE DOWLER, FOUNTAINE v. AMHERST (LORD), [1909] 2 Ch. 382; 78 L. J. Ch. 648; 101 L. T. 83; 25 T. L. R. 689—C. A.]**

**V. CONSTRUCTIVE TRUSTS.**

*See* INDUSTRIAL SOCIETIES, No. 1.

**VI. DISTRIBUTION.**

[No paragraphs in this vol. of the Digest.]



## VII. INVESTMENTS.

See also WILLS, No. 48.

4. *Mortgage—Report of Surveyor—Fee Dependent on Mortgage being Carried Through—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8 (1).*—The practice of making the fee of a surveyor, appointed by trustees to report on property on which an advance of trust money on mortgage is contemplated, depend on the mortgage being carried through is one not to be countenanced. The Court might not feel justified in accepting a certificate given in such circumstances as sufficient to satisfy the provisions of the Trustee Act, 1893.

MARQUIS OF SALISBURY *v.* KEYMER, [1909]  
[W. N. 31 ; 25 T. L. R. 278—Warrington, J.]

5. *Mortgage—Unfinished Houses—“Two-thirds Rule”—Mortgage of Part of Property Valued—Valuer Chosen by Mortgagor—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 8, 9—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.*—Lending trust money on unfinished houses is not in itself a breach of trust.

Trustees are not *prima facie* entitled to lend on mortgage two-thirds of the value of the mortgaged property, whatever its nature and whatever method of valuation they have adopted, as the so-called “two-thirds rule” represents, not the standard of the normal risk which a prudent man may incur, but the standard of the minimum protection which he may require.

Where the property valued is greater than that actually comprised in the mortgage and the valuer is not employed independently of the mortgagor, trustees cannot rely on the valuation for the purposes of obtaining protection under the Trustee Act, 1893, sect. 8.

SHAW *v.* CATES, [1909] 1 Ch. 389 ; 78 L. J. Ch. [226—Parker, J.]

6. *Mortgage—Contributory Mortgage—Not in Name or Under Legal Control of Trustee—Valuation—No Fee Unless Mortgage Carried Through—Acting Honestly but not “Reasonably”—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.*—A trustee with power to invest “in his own name or under his legal control” invested trust funds on a contributory mortgage of leasehold flats. The trustee had at his solicitor's suggestion appointed as valuer the surveyor who had introduced the investment to the solicitor and who was to have received no fee unless the mortgage was carried through. The mortgagor having become insolvent, nearly all the trust moneys invested were lost.

HELD—that the investment was a breach of trust, that sect. 8 of the Trustee Act, 1893, did not apply, and that the trustee, although he acted honestly, had not acted reasonably and was not entitled to relief from liability under sect. 3 of the Judicial Trustees Act, 1896.

IN RE DIVE, DIVE *v.* ROEBUCK, [1909] 1 Ch. [328 ; 78 L. J. Ch. 248 ; 100 L. T. 190—Warrington, J.]

7. *Lease—Royalties on Brick Earth—Tenants for Life and Remaindermen—Accumulation—*

*Rents, Issues, and Profits—No Express Power of Leasing.*—A testator devised his real estate on trust to divide the rents, issues, and profits among his daughters or their issue, subject to an annuity to his widow, and, on the death of the survivor of his widow and daughters, to sell and divide the proceeds among his grandchildren. The will contained no express powers of leasing and management. On the expiration of a lease in existence at the testator's death, part of the real estate was let from year to year to a tenant who paid royalties from brick earth extracted therefrom. The trustees accumulated the royalties.

HELD—that the royalties came within the gift of “rents, issues and profits,” and should have been paid to the tenants for life as they were received.

IN RE NORTH, GARTON *v.* CUMBERLAND, [1909]  
[1 Ch. 625 ; 78 L. J. Ch. 344—Eady, J.]

8. *Trust for Sale—Power to Retain—Trustees not Agreeing as to Retention—“Company in the United Kingdom”—Company Registered in England Operating Abroad.*—Where stocks and shares are bequeathed to trustees upon trusts for sale and conversion and reinvestment, with power to retain permanently any investments existing at the testator's death, and the trustees cannot agree as to the retention of any such investment, the investment must be sold.

The expression “companies in the United Kingdom” in an investment clause covers a company registered under the Companies Acts and having its head office and directorate in England, whose property and undertaking is in a foreign country.

IN RE HILTON, GIBBS *v.* HALE-HINTON, [1909]  
[2 Ch. 548 ; 101 L. T. 229—Neville, J.]

## VIII. PRACTICE.

See MORTGAGE, No. 15 ; PRACTICE, No. 29.

9. *Vesting Order—Infant—Stock Invested in Joint Names of Infant and Another Person—Infant Beneficially Entitled thereto—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 35, sub-s. 1 (ii.) (a)—Infants' Property Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 32—Trustee Extension Act, 1852 (15 & 16 Vict. c. 55), s. 3.*—Certain stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person.

HELD—that, notwithstanding the difference between the language of sect. 35 (1) (ii.) (a) of the Act of 1893 and that of sect. 3 of the Trustee Extension Act, 1852, the Court had jurisdiction to make an order vesting the right to transfer or call for a transfer of the stock in the infant's guardian.

In re Harwood (1882) 20 Ch. D. 536 and In re Barnett's Estate ([1889] W. N. 216 ; 61 L. T. 676) approved.

Decision of Joyce, J. reversed.

IN RE DEHAYNIN (INFANTS), [1909] W. N. 251  
[—C. A.]

**IX. RESULTING TRUST.**

*See* FRIENDLY SOCIETIES, No. 1; HUSBAND AND WIFE, Nos. 13, 14.

**X. TRUSTS FOR SALE, etc.**

*See also* EXECUTORS, No. 27; SETTLEMENTS, Nos. 11, 12; WILLS, No. 48.

**10. Conversion — Sale by Order of Court.**—Since the decision in *Steed v. Preece* (1874) L. R. 18 Eq. 192; 43 L. J. Ch. 687) it is established that an order of the Court rightfully made for the sale of an estate operates as a conversion from the date of the order, so that the proceeds of sale are personality.

BURGESS *v.* BOOTH, [1908] 2 Ch. 648; 78 L. J. [Ch. 32; 99 L. T. 677—C. A.

**11. Determination of Trustee's Power of Sale—Property "At Home."**—A power of sale of real estate given to trustees is not extinguished until all the purposes for which it was originally created have ceased to exist, and those purposes may include the payment of annuities charged upon the real estate in aid of the personal estate.

IN RE KAYE AND HOYLE'S CONTRACT, 53 [Sol. Jo. 520—Warrington, J.

**ULTRA VIRES.**

*See* COMPANIES; LOCAL GOVERNMENT; PUBLIC AUTHORITIES; RAILWAYS.

**UMPIRES.**

*See* ARBITRATION.

**UNDUE INFLUENCE.**

*See* CONTRACT; EQUITY, No. 1; HUSBAND AND WIFE, No. 6; WILLS, Nos. 3, 4.

**UNINCORPORATE ASSOCIATIONS.**

*See* BUILDING SOCIETIES; FRIENDLY SOCIETIES; LOAN SOCIETIES; TRADE AND TRADE UNIONS.

**UNLAWFUL ASSEMBLIES.**

*See* CRIMINAL LAW AND PROCEDURE.

**UNSOUND FOOD.**

*See* FOOD AND DRUGS; PUBLIC HEALTH.

**USE AND OCCUPATION.**

*See* LANDLORD AND TENANT.

**USES AND TRUSTS.**

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**USURY.**

*See* MONEY AND MONEY-LENDING.

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**VAGRANCY.**

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# VOIDABLE ASSIGNMENTS, WATERS AND WATER-CONVEYANCES, AND SETTLEMENTS.

See BANKRUPTCY; FRAUDULENT CONVEYANCES.

## VOLUNTARY ASSOCIATIONS.

See CHARITIES; CLUBS.

## VOLUNTEERS.

See ROYAL FORCES.

## WAGES.

See MASTER AND SERVANT.

## WAIVER AND ACQUIESCENCE.

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## WAREHOUSES AND WAREHOUSING.

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## WARRANTIES.

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## WASTE.

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### II. RIVERS.

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(b) Pollution

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### III. SEASHORE.

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See also CROWN PRACTICE, No. 1;  
FISHERIES; HIGHWAYS; LOCAL  
GOVERNMENT (BYE-LAWS); RAIL-  
WAYS AND CANALS; SEWERS AND  
DRAINS; SHIPPING AND NAVIGA-  
TION.

### I. IN GENERAL.

1. *Sluices Improperly Opened—Damage to Barge—Negligence of Agent or Breach of Duty.*—The defendants, as lessees, were assignees of all rights and interest, including a right to take tolls, in a part of the river R. The plaintiff's barge was injured as a result of a lock-keeper having opened certain sluices whereby the water in that part of the river was lowered so that the barge grounded.

HELD—that the defendants owed no duty to the plaintiffs to keep up a head of water at the mill gates and therefore that the action failed.

Decision of Lord Coleridge, J. (25 T. L. R. 569) reversed.

S. WILLIAMS AND SONS, LD., AND ANOTHER *v.*  
[PARSONS AND PARSONS, 26 T. L. R. 78; 54  
Sol. Jo. 64—C. A.

2. *Use of Supply Without Right or Permission—Pollution by Sewage—Cause of Action—Damages.*—Owing to an escape of sewage from a sewer vested in an urban district council, the supply of drinking water used by an adjacent hydropathic establishment became polluted, and an outbreak of typhoid fever occurred in the establishment. In an action by the proprietor against the council for damages for the pollution of the water supply, it appeared that the plaintiff had been taking water which belonged to the defendant council without any right or permission to do so, and without the council's knowledge; and further that the pollution took place on the council's land where the water was collected. The jury found that the pollution was due to negligence on the part of the defendant council, and that there was no contributory negligence



### I. In General—Continued.

on the part of the plaintiff, and awarded damages to the plaintiff.

**HELD** by C. A. (72 J. P. 273), reversing the decision of Lawrance, J. (72 J. P. 101)—that the plaintiff had not established any breach of a duty on the part of the defendants, and that his action failed.

**HELD** by the House of Lords—that no ground had been shown for interfering with the decision of the Court of Appeal.

**FERGUSON v. MALVERN URBAN DISTRICT COUNCIL**, 73 J. P. 361—H. L.

**3. Navigable Non-Tidal Lake—Right of Crown—Public User.**—The Crown is not, of common right, entitled to the soil or waters of an inland non-tidal lake.

No right can exist in the public to fish in the waters of such a lake.

**O'NEILL v. JOHNSTON**, [1908] 1 I. R. 358—  
[Ross, J.]

Affirmed, [1909] 1 I. R. 237—C. A., Ireland.

## II. RIVERS.

### (a) Ownership of Soil.

[No paragraphs in this vol. of the Digest.]

### (b) Pollution.

#### (i.) Manufacturing Refuse.

**4. Factory Effluent—Facilities for Carrying into Sewers—"Sewers" Sufficient for the Requirements of the District—Bacterial Purification Works—Rivers Pollution Prevention Act, 1876** (39 & 40 Vict. c. 75), s. 7.]—By sect. 7 of the Rivers Pollution Prevention Act, 1876: "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers;

"Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district. . . ."

**HELD**—that the word "sewers" in this proviso means the sewerage system of the district, and not merely the pipes into which the sewage is received, and that where sewage is passed by sewers into bacterial purification works, and such works are only sufficient for the requirements of the district, the sanitary authority cannot be required to afford a manufacturer facilities under the section.

Decision of C. A. ([1908] 2 K. B. 780; 77 L. J. K. B. 1079; 99 L. T. 641; 72 J. P. 409; 24 T. L. R. 809; 6 L. G. R. 997) affirmed.

**JONAS BROOK & BROS., LD. v. MELTHAM URBAN DISTRICT COUNCIL**, [1909] A. C. 438; 78 L. J. K. B. 719; 100 L. T. 818; 73 J. P. 353; 25 T. L. R. 582; 53 Sol. Jo. 541; 7 L. G. R. 770—H. L.

**5. Manufacturing Refuse Sent into Sewer and thence into Stream—Liability of Manufacturer—Rivers Pollution Act, 1876** (39 & 40 Vict. c. 75), ss. 3, 4, 7, 10.]—By sect. 4 of the Rivers Pollution Prevention Act, 1876, "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. . . ."

A person who sends polluting liquid proceeding from a factory or manufacturing process into a sewer, vested in the sanitary authority, through which it flows into a stream, commits an offence under the above section, at all events, if he does not prove that the sanitary authority has afforded him facilities for draining his factory into the sewer under sect. 7 of the Act.

*Seem*, even if he does prove that he has been afforded such facilities by the sanitary authority, he also commits an offence under sect. 4.

**Kirkheaton Local Board v. Ainley, Sons & Co.** ([1892] 2 Q. B. 274; 61 L. J. Q. B. 812; 56 J. P. 374; 67 L. T. 209; 41 W. R. 99—C. A.) followed.

Decision of C. A. (72 J. P. 193; 98 L. T. 789; 6 L. G. R. 634) affirmed.

**BUTTERWORTH AND ROBERTS v. WEST RIDING [OF YORKSHIRE RIVERS BOARD]**, [1909] A. C. 45; 78 L. J. K. B. 203; 100 L. T. 85; 73 J. P. 89; 25 T. L. R. 117; 53 Sol. Jo. 97; 7 L. G. R. 189—H. L.

#### (ii.) Sewage.

*See also* No. 9, *infra*.

**6. Local Authority—Deteriorating the Purity of the Water—Injunction—Works Preventing Pollution—Public Health Act, 1875** (38 & 39 Vict. c. 55), s. 17.]—An injunction having been granted by Kekewich, J. ([1908] 2 Ch. 551; 77 L. J. Ch. 836; 98 L. T. 310; 72 J. P. 20; 24 T. L. R. 126), restraining the defendants from conveying sewage or filthy water into a river until the sewage or water was freed from all noxious matter such as would deteriorate the purity of the water in the river, the Court of Appeal discharged the injunction on it being shown that the state of things existing at the date of the judgment had been changed by the permanent works of the defendants, and that there was no longer any breach of sect. 17 of the Public Health Act, 1875, and the defendants undertaking to use their best endeavours to prevent any recurrence of such breach.

**ATTORNEY-GENERAL v. BIRMINGHAM, TAME [AND REA DRAINAGE BOARD]**, [1909] W. N. 235; 26 T. L. R. 93—C. A.

#### (iii.) Procedure.

[No paragraphs in this vol. of the Digest.]

### (c) Repairing Banks, etc.

[No paragraphs in this vol. of the Digest.]

## II. Rivers—Continued.

## (d) Rights of Riparian Owners.

**7. Artificial Watercourse—Flow Controlled by Lower Occupier—Presumptions—Rights to Flow and Reasonable Use—Liability for Damage by Overflow.**—The defendants were occupiers of a water corn mill on an ancient artificial cut or stream about half a mile in length which flowed from and into a river at a point below their mill. The title of the owners of the mill went back to the year 1765 and included all weirs appertaining to the premises, and also the land on which were the weir and movable sluices by which the water of the river was diverted into the cut. The weir and sluices had always been repaired and controlled by the miller. The plaintiffs, whose title extended to 1673, were owners of a tannery on the stream between the mill and the weir. There was no evidence as to the date or circumstances in which the channel was cut. The miller had used the water of the stream for the purposes of his mill and had repaired the banks and bed of the stream but not in the limits of the tannery. The tanner had abstracted water from the cut by means of pipes, fixed inclosures for washing hides in the bed, and built bridges across it but not so as to sensibly diminish the flow. In an action for an injunction against the defendant for cutting off the water, breaking the plaintiffs' pipes, and threatening to demolish their bridges:—

**HELD**—that, as the facts showed that the plaintiffs were owners of the bed of the stream through their land they had committed no trespass in constructing bridges or laying pipes, and that as the water flowed to them over the land of another, the proper presumption was that there was originally an arrangement that the flow of water was for the mutual benefit of them and that other.

*Burrows v. Lang* ([1901] 2 Ch. 502; 70 L. J. Ch. 607; 49 W. R. 564; 84 L. T. 623; 17 T. L. R. 514) distinguished.

The principle of *Fletcher v. Rylands* (L. R. 3 H. L. 330; 37 L. J. Ex. 161; 14 W. R. 799; 19 L. T. 220) does not extend to make the owner of land liable for damage done by the escape of water collected on his land by another for his own purposes.

*Semble*, in the absence of evidence as to the terms and conditions under which the artificial channel was made, the proper grant to presume is a grant of the easement or right of the running of water, and *prima facie* every proprietor is entitled to the bed of the channel adjoining his land.

**WHITMORES (EDENBRIDGE). L.D. v. STANFORDS.** [1909] 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 924; 25 T. L. R. 169; 53 Sol. Jo. 134—Eve, J.

**8. Impounding of Water from Spring—Flow Artificially Increased—Burden of Proof.**—Where an upper riparian owner alleges that he has increased by artificial means the flow of water from a spring, the water of which ought *prima facie* to come down to a lower riparian owner, the onus of proving the fact and amount

of such increase rests on the upper riparian owner, and the lower riparian owner ought not as a condition of enforcing his rights as such to be required to prove what was the extent of the flow before the artificial means were applied.

**BOROUGH OF PORTSMOUTH WATERWORKS CO. v. LONDON, BRIGHTON, AND SOUTH COAST RY. CO.,** 73 J. P. N. C. 624—Parker, J.

## (e) River Thames.

**9. Sewer Discharging into Thames—"Cause or suffer to flow or pass"—Local Sanitary Authority's own Sewage—Liability—Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 94.**—By sect. 94 of the Thames Conservancy Act, 1894, "whenever any sewage or matter . . . is caused or suffered to flow or pass into the Thames or into any tributary, then and in every such case, even though such sewage or matter . . . had been lawfully so caused or suffered to flow or pass before the passing of this Act, the conservators" can give notice to discontinue such flow or passage, and if it is not discontinued a penalty is provided by the section.

A certain sewer vested in the respondents passed sewage into the Thames, and, although notice was served on the respondents, such passage of sewage was not discontinued.

**HELD**—that the respondents were within sect. 94 in respect of the sewage that they poured into the sewer from their own buildings, which found its way into the Thames through such sewer.

**THAMES CONSERVATORS v. MAYOR, ETC., OF GRAVESEND,** 100 L. T. 964; 73 J. P. 381; 7 L. G. R. 868—Div. Ct.

**10. Watermen and Lightermen—Thames Tunnel (Rotherhithe and Ratcliff) Act, 1900 (63 & 64 Vict. c. cxcix.), s. 56—Working as Lighterman before the Passing of the Act—Owner of a Boat and Holder of a Boat Licence Subsequent to Act.**—The clerk to the Watermen's Company should give a certificate to a lighterman under sect. 56 of the Thames Tunnel (Rotherhithe and Ratcliff) Act, 1900, as being the owner or hirer of a boat and the holder of a boat licence and to have been working within a period of not less than three years before the passing of that Act, if he has so worked as a lighterman, but has become the owner or hirer of a boat and the holder of a boat licence subsequent to the passing of that Act.

**R. v. WHITE, EX PARTE MURRAY,** 73 J. P. 505—[Div. Ct.]

## III. SEASHORE.

See also CROWN PRACTICE, No. 1.

## (a) In General.

[No paragraphs in this vol. of the Digest.]

## (b) Rights over Foreshore.

**11. Taking Shingle—Bona Fide Claim of Right—Order of Board of Trade—Harbours Act, 1814 (54 Geo. 3, c. 159), ss. 14, 28—Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), s. 16.**—By an order of the Board of Trade duly made in 1908

## III. Seashore—Continued.

under sect. 14 of the Harbours Act, 1814, the removal of shingle or ballast from the shores or banks of the sea within a defined area was prohibited under a penalty of £10. Subsequent to the date of such order, the respondent removed shingle from a part of the shore within the particular area, claiming to be entitled to do so by virtue of being the owner of that part of the shore under a conveyance from the Crown in 1873. In proceedings against the respondent for having unlawfully removed shingle in contravention of the order of the Board of Trade, the justices were of opinion that the respondent had done the act complained of under a *bonâ fide* claim of right to do so, and that their jurisdiction was thereby ousted; they accordingly dismissed the charge.

HELD—that a *bonâ fide* claim of right had been raised, and that therefore the justices were right in determining that their jurisdiction was ousted.

BURTON v. HUDSON, [1909] 2 K. B. 564; 78 [L. J. K. B. 905; 101 L. T. 233; 73 J. P. 401; 25 T. L. R. 641—Div. Ct.

## WATERWORKS.

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See also METROPOLIS, Nos. 15, 16;  
RAILWAYS AND CANALS, Nos. 34,  
35; WATERS AND WATERCOURSES,  
No. 2.

## I. IN GENERAL.

1. *Ultra vires—Special Act—Purchase of Land by Agreement—Sinking Well—Erecting Pumping Station—Ancillary Works—Waterworks Clauses Act, 1847* (10 & 11 Vict. c. 17), ss. 1, 28–30, 35.]—A water company was incorporated by an Act of 1878, by which they were empowered to purchase by agreement land for the purposes of their authorised undertaking, and by an Act of 1892 they were authorised to acquire additional land for the purposes of their authorised undertaking. The scheme authorised by the Act of 1892 was abandoned, and the company acquired by agreement other land at H., where they erected a pumping station. The company now proposed to lay down a water main from H. under a public footpath passing on the west side of the plaintiffs' land. It was admitted that the footpath was not repairable by the inhabitants at large, but was under the control of the plaintiffs.

HELD—that the works at H. were not ancillary

to the company's main undertaking and were new works unauthorised by statute.

HELD ALSO—that sect. 28 of the Waterworks Clauses Act, 1847, must be read in connection with sect. 1, and all that is given is authority to enable the company to carry out their authorised undertaking; that the plaintiffs, having established their title to the land, were entitled to an injunction to restrain the company from trespass without joining the Attorney-General; and that the degree of damage was immaterial.

MARRIOTT v. EAST GRINSTEAD GAS AND [WATER Co., [1909] 1 Ch. 70; 78 L. J. Ch. 141; 99 L. T. 958; 72 J. P. 509; 25 T. L. R. 59; 7 L. G. R. 477—Eady, J.

2. *Statutory Powers—Power to Purchase Additional Land by Agreement—Erecting Pumping Stations on Land—Ultra Vires—Delay—South Staffordshire Waterworks Act, 1893* (56 & 57 Vict. c. xcii.), s. 9.]—In cases of *ultra vires*, delay is not a ground for refusing relief in a suit by the Attorney-General.

Injunction granted restraining the defendants from maintaining two pumping stations not authorised by their special Acts.

Attorney-General v. Frinley and Farnborough District Water Co. ([1908] 1 Ch. 727; 77 L. J. Ch. 442; 98 L. T. 905; 72 J. P. 204; 24 T. L. R. 473; 6 L. G. R. 689) applied.

ATTORNEY-GENERAL (ON RELATION OF SEISDON [RURAL DISTRICT COUNCIL] v. SOUTH STAFFORDSHIRE WATERWORKS Co., 25 T. L. R. 408—Warrington, J.

## II. CHARGES FOR WATER.

[No paragraphs in this vol. of the Digest.]

## III. COMPENSATION WATER.

[No paragraphs in this vol. of the Digest.]

## IV. DIVIDENDS.

[No paragraphs in this vol. of the Digest.]

## V. SUPPLY OF WATER.

3. *Domestic Purposes—Dwelling-house—School—Purposes of Trade or Business—Special Act.*]—A waterworks company's special Act provided that the company should, at the request of occupiers of houses, furnish them with a supply of water for domestic purposes at specified rates, but that the company should not be compelled to supply water to any dwelling-house otherwise than by agreement where any part of such house was used for any trade, manufacture, or business for which water was required. The company supplied water to the plaintiff's house, which was used as a boarding school.

HELD—that the plaintiff was entitled to be supplied with water at the rate specified for the supply of water for domestic purposes.

Chester Waterworks Co. v. Chester Union (98 L. T. 701) followed.

FREDERICK v. BOGNOR WATER CO., [1909] 1 [Ch. 149; 78 L. J. Ch. 40; 99 L. T. 728; 72 J. P. 501; 25 T. L. R. 31; 53 Sol. Jo. 31; 7 L. G. R. 45—Eve, J.



### V. Supply of Water—Continued.

4. *Statutory Limits of Supply—Delivery of Water to Consumer Outside Limits—Injunction—West Gloucestershire Water Acts, 1884 (17 & 48 Vict. c. cxxlix.), ss. 4, 6, 56; 1887 (50 & 51 Vict. c. cc.); and 1899 (62 & 63 Vict. c. clviii.).*—By a water company's private Acts the company was authorised to give a supply of water within certain specified parishes.

HELD—that a "supply" of water covered the delivery of water for use at the terminals, wherever they might be, at which a consumer took possession of the water and devoted it to his own use.

The water company extended its water main to the boundary of the district within which it was authorised by statute to supply water, and from thence continued it, at the cost of a consumer, to a place beyond its district, and there erected a hydrant and meter from which pipes were laid to the consumer's house.

Decision of Neville, J. ([1909] 1 Ch. 636; 78 L. J. Ch. 361; 100 L. T. 427; 73 J. P. 228; 25 T. L. R. 350) affirmed.

HELD—that the company was not entitled to give such supply and must be restrained by injunction from doing so.

ATTORNEY-GENERAL *v.* WEST GLOUCESTER-SHIRE WATER COMPANY, [1909] 2 Ch. 338; 78 L. J. Ch. 746; 101 L. T. 258; 73 J. P. 453; 25 T. L. R. 650; 7 L. G. R. 1078—C. A.

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## WEIGHTS AND MEASURES.

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See also FOOD AND DRUGS, Nos. 9 to 12.

### I. INSPECTORS.

See FOOD AND DRUGS, No. 7.

### II. SALE OF COAL.

1. *Delivery in Sacks—Separate Loads—Weight Ticket—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 21, sub-s. 1.*—Where coal is delivered under one order in several loads in sacks of a specified number and weight, a ticket delivered with the first load of coal, before any coal is unloaded, is a sufficient compliance with sect. 21, sub-sect. 1, of the Weights and Measures

Act, 1889, and a separate ticket with each load subsequently delivered is not required.

*Slangoe v. Slatter* ((1896) 60 J. P. 342) distinguished.

KYLE *v.* DUNSDON, [1908] 2 K. B. 293; 77 L. J. K. B. 517; 72 J. P. 292; 98 L. T. 752; 24 T. L. R. 505; 6 L. G. R. 578; 21 Cox. C. C. 587—Div. Ct.

2. *Weight of a Sack of Coal—Representation by Seller—Liability of Carter—Mens rea—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 29, sub-s. 2.*—The appellant was a carter employed by coal merchants, and was sent by them in charge of a cart to deliver coal which they had sold. The coal was in sacks, each of which was labelled 1 cwt. A number of sacks were short in weight, but the appellant did not know this.

HELD—that in the absence of *mens rea* the appellant could not be convicted of an offence against sect. 29, sub-sect. 2, of the Weights and Measures Act, 1889.

PAUL *v.* HARGREAVES, [1908] 2 K. B. 289; 77 L. J. K. B. 535; 72 J. P. 231; 98 L. T. 751; 24 T. L. R. 501; 6 L. G. R. 530; 21 Cox. C. C. 584—Div. Ct.

3. *Validity of Bye-law—Weights and Measures Act, 1889 (52 & 53 Vict. c. 21), s. 28 (1).*—Sect. 28, sub-sect. 1 of the Weights and Measures Act, 1889, empowers local authorities to make bye-laws "regulating for the purposes of this Act" the sale of coal in quantities not exceeding 2 cwt. A county council made a bye-law that every person selling coal in quantities of less than 2 cwt. should register with the inspector of weights and measures his name and place of business, if such place of business was situate within the county.

HELD—that the bye-law was reasonable and was a bye-law regulating the sale of coal for the purposes of the Act.

WARD *v.* FRANKLIN, [1909] W. N. 200; 101 L. T. 681; 73 J. P. 506; 7 L. G. R. 1075—Div. Ct.

### III. WEIGHING AND WEIGHING MACHINES.

[No paragraphs in this vol. of the Digest.]

### IV. MISCELLANEOUS.

4. *Unjust Measure—Possession for Use "for Trade"—Milk Churns—Used for Conveyance of Milk—Not Used as Measures—Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), s. 25.*—The respondents were the owners of a milk churn which they supplied to a farmer for the purpose of sending his milk to their dairy. The churn was marked with discs which were apparently intended to represent barn gallons, but did not accurately do so. The respondents were summoned for having in their possession for use for trade an unjust measure, viz., the churn in question. The farmer stated in evidence that the marks on the churn were the foundation of his bills to the respondents. The respondents' secretary stated that they never measured by the

**IV. Miscellaneous—Continued.**

discs or intended them to be used as measures, and that they were really only an index to the height of the milk in the churn. The justices found as a fact that the churn was in the possession of the defendants for use for trade, but as a vessel for the conveyance of milk only, and not as a measure, and they dismissed the summons.

**HELD**—that as there was evidence on which they could so find, the magistrates' decision must be affirmed, and, *semble*, the Court agreed with it.

**BELLAMY v. GREAT WESTERN AND METROPOLITAN DAIRIES, LD.**, 98 L. T. 757; 72 J. P. 284; 6 L. G. R. 772; 21 Cox, C. C. 598—Div. Ct.

**WESTERN AUSTRALIA.**

*See* DEPENDENCIES AND COLONIES.

**WHARVES.**

*See* MASTER AND SERVANT; SHIPPING AND NAVIGATION.

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See also CHARITIES; DEATH DUTIES, Nos. 1, 2, 3, 8; DEPENDENCIES, Nos. 10, 15, 30, 36; DESCENT AND DISTRIBUTION; ESTOPPEL, No. 3; EXECUTORS; GIFTS, No. 1; PETUITIES; POWERS; SETTLEMENTS; SPECIFIC PERFORMANCE, No. 3; TRUSTS.

## I. TESTAMENTARY CAPACITY.

See No. 3, *infra*.

## II. EXECUTION.

## (a) Attestation.

## 1. Acknowledgment of Signature by Testator—Denial by Witness—Scottish Law.

Per Lord Dunedin and Lord Shaw of Dunfermline: It is not enough to set aside a probative deed in Scotland that one instrumentary witness simply says that he did not hear the signature acknowledged.

LOW v. GUTHRIE, [1909] A. C. 278; 78 L. J. [P. C. 126—H. L.]

## (b) Generally.

2. Mutual Codicils—Wrong Codicil Signed—Refusal to Rectify.]—A testatrix and her sister were making cross-codicils in identical terms. Each in error signed her sister's codicil instead of her own. Upon the death of one the Court refused to admit the codicil to probate by striking out the Christian name of the sister, on the ground that there was no intention on the part of the testatrix to execute the codicil proposed.

IN RE MEYER, [1908] P. 353; 77 L. J. P. 150; 99 [L. T. 881; 52 Sol. Jo. 716—Barnes, Pres.]

3. Propounder Benefiting by Will which he has Drafted—Burden of Proof—Knowledge of Testatrix—Testamentary Capacity not Sufficient.]—Where a plaintiff propounds a will which he has drafted for the testatrix and under which he benefits to a large extent, the burden is on him of proving that the document in question did really express the mind and intention of the testatrix, that she was conscious when she executed it that it really was her will, and that

she meant it to be the expression of her mind and intention.

*Barry v. Butlin* (2 Moo. P. C. 480), *Fulton v. Andrews* (L. R. 7 H. L. 448), *Tyrrell v. Painton* ([1894] P. 151) followed and applied.

FINNY v. GOVETT AND OTHERS, 25 T. L. R. 186 [—C. A.]

4. Will Prepared by Party Benefiting under it—No Evidence of Undue Influence—Grounds of Reduction—Scottish Law.]—The rule laid down by Parke, B., in *Barry v. Butlin* ((1838) 2 Moo. P. C. 480), and adopted by Lord Cairns in *Fulton v. Andrew* ( (1875) L. R. 7 H. L. 448, 461), that if a party writes or prepares a will under which he benefits that is a circumstance which calls upon the Court to be vigilant and jealous in examining the evidence in support of the will and before pronouncing in its favour to be satisfied that it does express the true will of the deceased, is not to be used as a screen behind which a man may make veiled charges of fraud or dishonesty without assuming the responsibility of making such charges in plain terms.

LOW v. GUTHRIE, [1909] A. C. 278; 78 L. J. [P. C. 126—H. L.]

## (c) Signature of Testator.

5. Signature in Margin—Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), s. 1.]—Probate granted of a will the signature to which was placed in the side margin of the paper containing the will.

IN THE GOODS OF ROBERT ARTHUR USBORNE, [DECEASED, 25 T. L. R. 519—Deane, J.]

## (d) Soldiers' and Seamen's Wills.

[No paragraphs in this vol. of the Digest.]

## (e) Testamentary Documents.

[No paragraphs in this vol. of the Digest.]

## III. INCORPORATION OF DOCUMENTS.

[No paragraphs in this vol. of the Digest.]

## IV. REVOCATION.

## (a) Destruction.

6. Tearing Will—Erasing Signatures—Declarations by Testatrix.]—In 1897 the testatrix duly executed her will, which was then placed untorn in an envelope, sealed up, and retained by her solicitor. In 1906, at her request, the solicitor sent the will to the testatrix. Some months later the testatrix stated to two people that she had destroyed her will, that when she got better she would make a new one, but that if she never recovered she should die intestate. After the death of the testatrix the will was found among her papers torn halfway across, the tear coinciding with the line of the testatrix's signature, and that signature and those of the two attesting witnesses were also erased with ink.

HELD—that the testatrix had torn her will *animus revocandi*.

NORTH AND ANOTHER v. NORTH AND OTHERS, [25 T. L. R. 322—Bigham, Pres.]



IV. *Revocation—Continued.*

7. *Will Torn in Testator's Presence without his Authority—Admitted to Probate.*—A will had been torn in pieces in the testator's presence without his authority, but the pieces had been subsequently preserved with his assent as representing his testamentary intentions.

HELD—that the will could be admitted to probate.

GILL AND ANOTHER *v.* GILL AND ANOTHER [AND THE OFFICIAL SOLICITOR, [1909] P. 157; 78 L. J. P. 60; 100 L. T. 861; 25 T. L. R. 400; 53 Sol. Jo. 359—Deane, J.

8. *Will Torn up—Afterwards Pieced Together—No Intention to Revoke.*—A will which had been in the possession of the testatrix who referred to it two months before her death was after her death found torn up and pieced together again.

HELD—(all parties interested consenting) that on the facts there was no presumption of revocation and that the will might be pronounced for.

IN THE ESTATE OF MACKENZIE, [1909] P. 305; [26 T. L. R. 39—Deane, J.

(b) *Generally.*

[No paragraphs in this vol. of the Digest.]

(c) *Revocation of Gift.*

See also Nos. 32, 39, *infra*.

9. *Gift to Children—Contingent Gift to Issue of Deceased Children—Codicil—Revocation of Gift to Children at Death—Period of Distribution Deferred—Effect of Codicil—Interpretation—Republication.*—A testatrix by her will left her residuary estate to be divided at her death among her six children, and in the event of any child dying leaving lawful issue his or her share was to be divided among such issue. By a codicil the testatrix revoked the gift to her children and directed her trustees to pay the income arising out of her residuary estate to her two daughters as long as they or one of them should live and remain unmarried, and after the death or marriage of both to divide the property among her six children "as in my said will I directed should be done immediately after my decease." The other children predeceased one of the daughters, leaving issue. The surviving daughter having died unmarried, the question was whether the legal representatives of the children of the testatrix or the grandchildren were entitled to their respective shares.

HELD—that the codicil had the effect of a new will made at the date of the codicil containing the same dispositions as the earlier will subject to the alterations introduced, that the period of distribution was merely altered from the death of the testatrix to the death of the life tenant, that the gift over to the grandchildren was not revoked by the codicil, and took effect on the death of their parent during the life of the life tenant.

IN RE TAYLOR, DALE *v.* DALE, [1909] W. N. 59—Eady, J.

10. *Substitution of Executor by Codicil—Residuary Gift to Former Executor.*—A testator bequeathed to B., his executor, if he should prove the will, and in addition to any other benefit to which he might be entitled under the will, the sum of £1,000. And the testator also gave one-third of the residuary proceeds of his estate to B. By a codicil to his will, the testator appointed F. to be an executor of his will in the place of B., and gave to him a legacy of £200 for acting as such executor. And the testator declared that his will should be construed and take effect as if the name of F. were inserted in his will "throughout," instead of the name of B.

HELD—that there was no revocation of the residuary gift to B.

IN RE FREEMAN, HOPE *v.* FREEMAN, 44 L. J. [N. C. 781; 128 L. T. Jo. 150—Joyce, J.

V. *ALTERATIONS AND ERASURES.*

[No paragraphs in this vol. of the Digest.]

VI. *MISTAKE AND AMBIGUITY.*

See also VII., *infra*.

(a) *Ambiguity.*

11. *Description of Legatee—Secretary of One Society—Address of Another Society.*—A testator left £500 "to the Anti-Vivisection Society, of 23, Northumberland Avenue, London, of which Mr. Coleridge is now secretary." The legacy was claimed by the Society for the Abolition of Vivisection, whose offices were at 23, Northumberland Avenue, and also by the "National Anti-Vivisection Society," whose offices were at 92, Victoria Street. No Mr. Coleridge had been secretary of the former society, while the Hon. Stephen Coleridge was from 1897 until after the date of the will honorary secretary and was now honorary treasurer of the latter society.

HELD—that, as "Coleridge" was a household word among persons opposed to vivisection, the National Anti-Vivisection Society was entitled to the legacy.

IN RE MORGAN, MARRIOTT *v.* SOCIETY FOR [THE ABOLITION OF VIVISECTION AND OTHERS, 25 T. L. R. 303—Parker, J.

(b) *Clerical Error.*

[No paragraphs in this vol. of the Digest.]

(c) *Evidence of Intention.*

[No paragraphs in this vol. of the Digest.]

(d) *Misdescription.*

12. *Wrong Christian Name—Explanatory Evidence—Instructions for Will—Admissibility.*—A testator gave a legacy to his "grandnephew," "Robert O." He had in fact no grandnephew or relative called Robert O. A contemporaneous document in the testator's own writing—instructions for the will in question—showed that the legacy was intended for Richard O., for the document described the legatee as brother of A. O., and the latter's brother was admittedly called Richard.

## VI. Mistake and Ambiguity—*Continued.*

**HELD**—that the document was admissible, not as showing what the testator intended, but as showing whom he was alluding to, and that Richard O. was entitled to the legacy.

Decision of Eady, J., reversed.

IN RE OFNER, SAMUEL F. OFNER, [1909] 1 Ch. [60; 78 L. J. Ch. 50; 99 L. T. 813—C. A.]

### (e) Mistake of Fact.

[No paragraphs in this vol. of the Digest.]

## VII. INTERPRETATION OF TERMS.

See also No. 11. *supra*.

### (a) "Children."

**13. Class Gift—Children of Named Sisters—Illegitimate Children of Sister past Child-bearing—Knowledge of Circumstances—Intention.**—*Prima facie* the term "children" in a will means legitimate children, and if there be nothing else, the illegitimate children of X. cannot share in a class gift to the children of X. and of other named persons. But where at the date of the will X. was a widow past child-bearing with two illegitimate children by her late husband and having no other children, and it appears that the testatrix knew all the circumstances of the case and was on affectionate terms with the children of X., effect must be given to the only possible meaning and intention of the testatrix so as to entitle the children of X. to share in the gift.

Judgment of Lord Cairns in *Hill v. Crook* (1873) L. R. 6 H. L. 265, 282; 42 L. J. Ch. 702; 22 W. R. 137—H. L.) applied.

IN RE EVE, EDWARDS v. BURNS, [1909] 1 Ch. [796; 78 L. J. Ch. 388; 100 L. T. 874—Eady, J.]

### (b) House and Effects.

**14. Specific Devise—House and Effects known as Cross Villa**—*Subsequent Alteration of Premises—Intention*—Wills Act, 1837 (1 Vict. c. 26), s. 24.]—A testator devised to his wife for life with remainder to a daughter the "house and effects known as Cross Villa." At the date of the will the testator was seised of about half an acre of ground with a house built upon part of it, in which he lived, the premises being known as "Cross Villa." In 1906 the testator erected two semi-detached dwelling-houses upon part of these premises, and separated such part from the rest by a hedge. He moved into one of these two semi-detached dwellings, which he named Ashgrove Villas, and died in 1908.

**HELD**—that the description of the subject of the gift was sufficiently precise so as to exclude the operation of sect. 24 of the Wills Act, and that the gift therefore passed the whole of the property with all the buildings erected thereon.

IN RE EVANS, EVANS v. POWELL, [1909] 1 Ch. [784; 78 L. J. Ch. 441; 100 L. T. 779—Joyce, J.]

### (c) "Pictures."

**15. Miniatures Included.**—A bequest of "pictures" held to include miniatures except

such miniatures as were accessories of some article of furniture, the subject of another bequest.

Decision of Eady, J. (99 L. T. 390; 24 T. L. R. 750) affirmed.

IN RE CRAVEN, CREWDSON v. CRAVEN, 100 [L. T. 284—C. A.]

### (d) Shares.

**16. Bequest of Shares in a Company—Shares Sub-divided Between Date of Will and Death of Testator—Will Speaking at Death—Wills Act, 1837 (1 Vict. c. 26), s. 24.]—A testator left a legacy of twenty-five shares in a company, part of a larger number he possessed. Between the date of the will and the testator's death each of these shares was divided so as to become five shares. The testator sold some of these shares both before and after this division.**

**HELD**—that this was a general legacy, that the will spoke as at death and showed no contrary intention within sect. 24 of the Wills Act, 1837, and that therefore the legatee took twenty-five shares in the reduced form in which they existed at the testator's death.

*Goodlad v. Burnett* (1855) 1 K. & J. 341) followed.

In *re Portal and Lamb* (1885) 30 Ch. D. 50) explained.

IN RE GILLINS, INGLIS v. GILLINS, [1909] [1 Ch. 345; 78 L. J. Ch. 244; 100 L. T. 226; 16 Manson, 74—Warrington, J.]

**17. Bequest of Shares in a Company—Shares Sub-divided between Date of Will and Death of Testator—Wills Act, 1837 (1 Vict. c. 26), s. 24.]—A testatrix gave a legacy of "ten old Belfast Bank shares." At the date of the will she had that number. Subsequently and before her death these shares were sub-divided by the company, the old name being retained.**

**HELD**—that the legacy was a general legacy and passed ten of the sub-divided shares or their value at her death.

IN RE MCAFEE, MACK v. QUIREY, [1909] 1 I. R. [124—Barton, J., Ireland.]

### (e) Miscellaneous.

**18. "To whom I have given Legacies"**—*Application to Legatees by Later Codicils—Republication.*—The words "persons and institutions to whom and to which I have given pecuniary legacies" in the first codicil of a will, which has eight codicils, cover persons and institutions benefited not only by the will and first codicil, but by any of the seven later codicils.

In *re Champion, Dudley v. Champion* ([1903] 1 Ch. 101; 62 L. J. Ch. 372; 67 L. T. 694—C. A.) explained and followed.

IN RE DONALD, MOORE v. SOMERSET, 53 Sol. Jo. [673—Warrington, J.]

**19. Legacy to Hospital to "Found" Bed.**—Where a sum is bequeathed to a hospital to enable a bed, to bear a specified name, to be provided, the particular word used by the testator—

## VII. Interpretation of Terms—Continued.

whether "found," "establish," "endow," or the like—is immaterial. If the intention to establish the bed in perpetuity can be gathered from the will, the amount bequeathed must be invested and a bed maintained out of the income so far as it will go. It is not, however, necessary that there should be a new bed, if the specified name can be given to an existing bed in the hospital.

ATTORNEY-GENERAL *r.* BELGRAVE HOSPITAL,  
[1909] W. N. 211; 101 L. T. 628; 26 T. L. R.  
40; 54 Sol. Jo. 31—Eady, J.

20. "*Plate and Plated Articles*"—*Articles Mounted with Plate*.]—The testator bequeathed to the plaintiff his "plate and plated articles."

HELD—that silver mounted mugs known as "black jacks" did not pass under the bequest.

IN RE LEWIS, PROTHERO *v.* LEWIS, 26 T. L. R.  
[145—Joyce, J.]

21. *Life Interest to Wife*—"My Own Brothers and Sisters at her Death"—*Whole or Half Blood*.]—A testator left property to his wife to be divided "at her death . . . among my own brothers and sisters at her death." All the testator's brothers and sisters, both of the whole and half blood, living at his death pre-deceased his widow, except one sister of the half blood.

HELD—that "my own" signified of the whole blood, that the repetition of "at her death" meant "living at her death," and that there was consequently an intestacy.

IN RE DOWSON, DOWSON *v.* BEADLE, [1909]  
[W. N. 245; 101 L. T. 671—Joyce, J.]

22. "*Anti-Vivisection Society, Bristol Branch*."—A testatrix bequeathed a legacy to the "Anti-Vivisection Society, Bristol branch." The legacy was claimed by the Bristol and West of England Anti-Vivisection Society, which was a branch of the British Union for the Abolition of Vivisection, and also by the National Anti-Vivisection Society, which had a branch at Bristol apparently for the purpose of collecting funds and transmitting them to the head office in London. The testatrix in her lifetime had given a donation to, and was a life member of, the former society, and had never given anything to the latter society.

HELD—that the Bristol and West of England Anti-Vivisection Society was entitled to the legacy.

IN RE GOLDSMID, GOLDSMID *v.* MARTINDALE,  
[Times, January 27th, 1909—Joyce, J.]

23. "*Ready Money in Hand*"—*Money on Deposit at Bank—Repayable on Demand—Power of Directors to Require Notice*.]—No distinction can be drawn between "ready money" and "ready money in hand," and a bequest of the latter will cover money on deposit at a bank which in practice requires no notice of withdrawal, although the bank directors have power to require such notice.

IN RE COSGROVES' ESTATE, WILLS *v.* GODDARD,  
[Times, April 3rd, 1909—Eady, J.]

24. "*Society for the Prevention of Cruelty to Women and Children*"—*No Society so Named*.]

—A testator gave a legacy to "the Society for the Prevention of Cruelty to Women and Children." There being no society so named, the legacy was claimed by the National Society for the Prevention of Cruelty to Children and by the Associated Societies for the Protection of Women and Children. There was no evidence connecting the testator with either society.

HELD—that the Associated Societies for the Protection of Women and Children were entitled to the legacy.

Decision of EVE, J. affirmed.

IN RE KAY, DECEASED, TATHAM *v.* INCORPORATED SOCIETY OF PSYCHICAL RESEARCH,  
[Times, June 18th, 1909—C. A.]

25. "*Next-of-Kin and Nearest Heir of My Name and Family*"—*Realty—Personalty*.]—A testator in dealing with an item of realty gave a gift over on certain contingencies "to my next-of-kin and nearest heir of my name and family." As to certain items of personalty he gave a gift over in identical terms. The contingencies having happened:—

HELD—that the personalty passed to the next-of-kin to be ascertained at the death of the testator and that the realty passed to his heir.

Decision of Barton, J., affirmed.

IN RE MAHER, MAHER *v.* TOPPIN, [1909] 1 I. R.  
[70; 41 I. L. T. 232—C. A., Ireland.]

26. *Arrears of Rent—Unsettled Land—Absolute Gift—Arrears of Rent out of Settled Land*.]—A testator gave to his eldest son absolutely "all my real and chattel real property, whether in possession, reversion, remainder, or expectancy or over which I have power of disposition, together with all rents, and arrears of rents, due thereout at the time of my death."

HELD—(Sir S. Walker, L.C., dissenting) that the son was entitled to arrears of rent due to the testator at his death out of settled lands as well as out of his unsettled lands.

IN RE WILLS, WILLS *v.* WILLS, [1909] 1 I. R.  
[268—C. A., Ireland.]

## VIII. SECRET TRUST.

See BANKRUPTCY, No. 20.

## IX. ELECTION.

27. *Married Woman—Gift of Husband's Personality to Third Person—Gift of her Own Property to Husband—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 1; s. 5*.]—A married woman, married in 1873, by her will made in 1903 gave specific personal property belonging to her husband to A., and gave an annuity out of her own property to her husband.

HELD—that the husband was put to an election.

*Rich v. Cockell* ((1804) 9 Ves. 369—Eldon, L.C.) considered.

IN RE HARRIS, LEACROFT *v.* HARRIS, [1909]  
[2 Ch. 206; 78 L. J. Ch. 448; 100 L. T. 805—

Parker, J.]



## IX. Election—Continued.

**28. Power of Appointment—Appointment Void for Remoteness—Gift to Persons Entitled in Default of Appointment.**—Where an appointment is partially void as transgressing the rule against the limitation of land to an unborn child with remainder to the latter's unborn child and there is a gift to persons entitled in default of appointment, such persons are not put to their election.

*In re Oliver's Settlement* ([1905] 1 Ch. 191—Farwell, J.) approved.

Decision of *Eve, J.* ([1909] 2 Ch. 450; 78 L. J. Ch. 657; 101 L. T. 153; 53 Sol. Jo. 698), affirmed.

*IN RE NASH, COOK v. FREDERICK*, [1909] W. N. [226—C. A.]

## X. ADEMPTION.

**29. Specific Legacy.**—A bequest of "the share in a sum of £10,000 Consols, to which I am, or may, in certain events, become entitled under the will of my father" is a specific legacy.

*IN RE BORRER'S TRUSTS, DUNLOP v. BORRER*, [54 Sol. Jo. 32—Eady, J.]

## XI. SATISFACTION.

[No paragraphs in this vol. of the Digest.]

## XII. HOTCHPOT.

See also POWERS, No. 10.

**30. Intestacy—Child Advanced by Widowed Mother.**—If a mother being a widow makes an advancement to a child and dies intestate leaving other children, the child advanced is not bound to bring the amount advanced into hotchpot.

*Holt v. Frederick* ((1726) 2 P. W. 356—King, L.C.), followed.

*PRESTON v. GREENE*, [1909] 1 I. R. 172—[Meredith, M.R., Ireland.]

## XIII. SUBSTITUTIONAL GIFT.

[No paragraphs in this vol. of the Digest.]

## XIV. CLASS GIFTS.

**31. One of Class Dying Intestate—Statute of Distributions to Apply in Default of Appointment—Tenancy in Common or Joint Tenancy.**—A testator bequeathed all his estate to trustees to pay the income after the decease of his widow to his five daughters or the survivor or survivors of them, in such manner as the trustees should think advisable for their maintenance. The will directed that subject to the provisions contained therein the trust funds should be considered as divided into five equal parts over which each daughter was to have a power of appointment, and that in default of appointment the share of any daughter dying without issue should go "to such persons as under the Statutes of Distribution would be her next-of-kin if she had died unmarried." A daughter died a spinster without having exercised the power of appointment. Her four sisters were her sole next-of-kin. The question was whether they took as joint tenants or tenants in common.

HELD—that where in a bequest reference is made to the Statute of Distributions the shares

as well as the class are to be ascertained by and in accordance with the statute, and that therefore the sisters took as tenants in common.

*Bullock v. Downes* ((1860) 9 H. L. Cas. 1) followed.

*IN RE NIGHTINGALE, BOWDEN v. GRIFFITHS*, [1909] 1 Ch. 385; 100 L. T. 292—Neville, J.

**32. Revocation of One Share by Codicil—Divisible among Class—No Intestacy.**—D. left all his residuary estate upon trust for conversion, the proceeds to be divided into as many equal shares as he should have daughters who should survive him or predecease him leaving issue, one share to go to each such daughter.

He had six daughters who all survived him, but by a codicil he revoked the gift to one of them.

HELD—that the residue must be divided into fifths, and that there was not an intestacy as to one-sixth part.

*IN RE DUNSTER, BROWN v. HEYWOOD*, [1909] 1 Ch. 103; 78 L. J. Ch. 138; 99 L. T. 921—Neville, J.

**33. Words of Futurity—Gift to Children of Nephews "who shall Die" in Testator's Lifetime—Nephew Dead at Date of Will.**—A testator directed the residue of his estate to be divided among his nephews and nieces living at his decease, "provided always that, if any of my nephews and nieces shall die in my lifetime leaving a child or children who shall survive me and attain the age of twenty-one years," such children should have the share that their parent would have had if he had survived the testator.

HELD—that the children of a nephew or niece already dead at the date of the will were entitled to share in the residue.

*In re Cope* ([1908] 2 Ch. 1; 77 L. J. Ch. 558; 99 L. T. 374) distinguished.

*In re Lambert* ([1908] 2 Ch. 117; 77 L. J. Ch. 553; 99 L. T. 851) followed.

*IN RE METCALFE, METCALFE v. EARLE*, [1909] 1 Ch. 424; 78 L. J. Ch. 303; 100 L. T. 222—Joyce, J.

**34. Costs of Ascertaining Members of Class—Payable out of Legacy or Residue—Intention of Testator—Discretion of Court—R. S. C. Ord. 65, r. 14B.**—A testator directed his trustees to stand possessed of his residuary estate after payment of his funeral and testamentary expenses, debts, and legacies, upon trust (*inter alia*) to raise after his wife's death the sum of £6,000, and to pay the same free of legacy duty to and amongst a class mentioned. Upon the death of the testator's widow an order was made by the Court for enquiry as to who were members of the class entitled to the legacy. On a summons taken out by the trustees, the Master directed the costs of the enquiry to be borne wholly by the legacy.

HELD—that the Court had a discretion with regard to the costs of the inquiry which was not taken away by Ord. 65, r. 14B, and that effect should be given to the testator's intention by

#### XIV. Class Gifts—Continued.

ordering the costs, except such as were caused by the incumbrance of shares, to be paid out of residue.

IN RE VINCENT, ROHDE v. PALIN, [1909] 1 Ch. [810; 78 L. J. Ch. 455; 100 L. T. 957—Parker, J.]

**35. Gift to Issue—Construction—Original Gift of Residue Amounting to a Gift to Issue per stirpes—Further Ambiguous Gift to Issue in Event which did not Happen—Issue Competing with Parents.**—A testator devised and bequeathed his residuary estate upon trust for his widow for life and his four daughters after her decease for their lives, and on the decease of the survivor of the widow and daughters “unto, between, and amongst the issue then living of my said four daughters in equal shares according to the parent stock and not to the number of individual objects to the intent that the issue then living of any one of my said daughters may be entitled to a share equal to that which the issue (if any) of any other of them shall be entitled to, and in case there shall be issue then living of only one of them my said daughters then the whole to be paid to or equally divided amongst such issue.” At the date of the death of the last surviving daughter there were living children of three of the testator’s daughters and children and grandchildren of his fourth daughter.

HELD—that the original gift was an unambiguous gift to the issue of the daughters *per stirpes*, children not taking concurrently with their parents, and was not affected by the gift over in the event of there being issue living of only one of the daughters, which event did not happen.

IN RE RAWLINSON, DECEASED, HILL v. [WITHALL, [1909] 2 Ch. 36; 78 L. J. Ch. 443; 100 L. T. 509—Joyce, J.]

#### XV. LAPSE.

[No paragraphs in this vol. of the Digest.]

#### XVI. ABSOLUTE GIFT.

**36. Gift until Marriage—Legatee Dying Unmarried—Absolute Gift.**—A testatrix bequeathed her residuary estate to trustees and directed them to pay the income from it to A. M. until she should marry, and on her marriage to pay her a certain sum and to divide the balance among certain other persons. A. M. died after the testatrix, without having been married.

HELD—that there was an absolute gift of the residuary estate to A. M.

MASON v. MASON, 101 L. T. 669—Joyce, J.

#### XVII. CONDITIONS.

##### (a) Condition Precedent or Subsequent.

[No paragraphs in this vol. of the Digest.]

##### (b) Contingent Gift.

[No paragraphs in this vol. of the Digest.]

##### (c) Forfeiture.

**37. Forfeiture Clause—Construction—“Would be Deprived of the Personal Enjoyment thereof”**—

*Equitable Assignment of Future Income—Notice to Trustee—Debt Discharged before Next Dividend Payable by Trustee.*—A testator devised and bequeathed his residuary estate to trustees upon trust (*inter alia*) to pay one-third part of the income to F., during her life, “unless and until some event shall have happened or shall happen whereby if the same income belonged absolutely to her she would be deprived of the personal enjoyment thereof or any part thereof,” and in case of a forfeiture he gave his trustees a discretionary power. Acting on an agreement with P., a judgment creditor for £260, F. wrote the following in a letter to the trustee of the will: “I owe P. the sum of £260. I have arranged with her to find her £100 this week, and I want you to pay direct to her or her representative the balance of £160 out of the next dividend due to me from the B. T. shares.” The B. T. shares formed part of the testator’s residuary estate. Before the next dividend became due, F. had paid her debt to P. and revoked the letter.

HELD—that, on the construction of the particular words of the will, the object of which was to preserve the life interest, and in the events which had happened, there had been no forfeiture of the interest of F. under the will.

IN RE MAIR, WILLIAMSON v. FRENCH, [1909] [2 Ch. 280; 78 L. J. Ch. 711; 101 L. T. 70—Neville, J.]

**38. Right to Receive Income Vesting in any Other Person—Power of Attorney to Solicitor—Authority to Agent.**—W. H. S. was entitled for life to the income bequeathed by a will which provided that if he should commit or suffer any act, default, or process whatsoever which, but for that proviso, would have the effect of vesting the right to receive the interest in any other person whomsoever, the life interest of W. H. S. should cease and be void and the income be paid as on his death.

W. H. S., being about to go to South Africa, executed a general power of attorney to his solicitor W., who was a trustee of the testator’s will, and on W.’s going abroad and retiring from the trusteeship in 1906 executed a power of attorney appointing his then solicitor K. in his name and behalf to recover and receive all sums of money in respect of the interest under the will.

HELD—that the power of attorney being a mere authority to receive the income of W. H. S.’s interest under the will and apply it for his benefit, and not a colourable transaction giving his creditors an equitable charge it did not constitute a forfeiture within the meaning of the will.

IN RE SWANNELL, MORICE v. SWANNELL, 101 [L. T. 76—Eve, J.]

##### (d) Heirlooms.

See No. 43, *infra*.

##### (e) Name and Arms Clauses.

[No paragraphs in this vol. of the Digest.]

##### (f) Restraint of Marriage.

[No paragraphs in this vol. of the Digest.]

## XVII. Conditions—Continued.

## (g) General.

[No paragraphs in this vol. of the Digest.]

## XVIII. VESTING.

**39. Period of Distribution—Postponement—Allowance to Widow—Allowance for Maintenance of Children till Youngest Attains Twenty-one—Residue then to be Divided among Sons—Codicil—Power to Increase Wife's Allowance—Disposition of Residue in Event of Children Dying Without Issue—Bequest of Residue to Sons Not Cut Down by Codicil.**—A will directed the trustee and executor to pay an annual sum to the testator's wife for life or till re-marriage, to pay an annual sum to the testator's children for their maintenance till the youngest should attain the age of twenty-one years, and then to settle certain sums on his daughters and to divide the residue equally among his sons then living. A codicil authorised the trustee in his discretion to increase the payment to the widow, and then declared that, "in the event of all my children dying without leaving lawful issue," the testator gave all his estate to his brother.

**HELD**—that the provisions of the codicil did not conflict with, but were supplementary to, the provisions of the will; that the codicil merely sought to deal with two contingencies not touched by the will, and did not revoke, cut down, or make contingent the dominant bequest to the sons, and that the power given to the trustee to increase the widow's allowance did not postpone the distribution of the residue until the widow's death, as she had agreed to such distribution, subject to a sum being set apart to provide an ample increase in her allowance.

Order of Supreme Court of New South Wales (7 S. R., N.S.W., 846) varied.

**HORDERN AND ANOTHER v. HORDERN**, [1909] A. C. 210; 78 L. J. P. C. 49; 100 L. T. 52; 25 T. L. R. 185—P. C.

**40. Construction—Mixed Gift of Realty and Personality to Children and their Children—Gift in Succession—Executory Bequest or Limitation Over on Death of Testator's Children—Rule in Wild's Case.**—J. by his will devised and bequeathed all his leasehold and real estate to his wife for life, and after her decease he devised and bequeathed whatever might be left to his children in the following proportions: namely, two-fifths of the whole of his estate to his son M. J., and the other three-fifths to his daughters M. M. and E. E. in two equal shares, "and to the child or children of the three said children." And the testator provided that in the case of any of his children dying and leaving no legal issue the share or shares of those dying should go to the surviving child or children of such as were dead, his daughters' and granddaughters' shares to be independent and free from all husbands.

**HELD**—that no child was at present entitled to his or her share absolutely, but that such share was subject upon the death of the child to an executory bequest or limitation over to his or her children.

Observations on the rule in *Wild's Case* ((1599) 6 Co. Rep. 16b.).

**IN RE MORDECAI JONES, LEWIS v. LEWIS**, [1909] W. N. 228; 101 L. T. 549—Joyce, J.

## XIX. DIVESTING.

[No paragraphs in this vol. of the Digest.]

## XX. PERPETUITIES AND REMOTENESS.

**41. Construction—Gift Void for Remoteness.**—A testator left his real estate to his two sons as tenants in common in fee simple subject to an obligation upon them, "their heirs and assigns," of making certain payments to each of his daughters for life, "and afterwards to and amongst the children of each and their heirs," out of the royalties or dead rents, as the case might be, payable in respect of coal under his land when worked or let. The coal was not worked or let in the testator's lifetime.

**HELD**—that the disposition in favour of the children of the daughters and their heirs was void for remoteness.

*London and South Western Ry. Co. v. Gomm* (16 L. T. R. 419; 20 Ch. D. 562) approved and followed.

Decision of C. A. affirmed.

**EDWARDS AND OTHERS v. EDWARDS AND [OTHERS]**, [1909] A. C. 275; 78 L. J. Ch. 504; 100 L. T. 84—H. L.

## XXI. CREATION OF ESTATE TAIL.

[No paragraphs in this vol. of the Digest.]

## XXII. DIRECTIONS TO TRUSTEES.

See also No. 36, *supra*; Nos. 53, 57, *infra*.

## (a) Investment Clause.

See **TRUSTS**, Nos. 6, 7, 8.

## (b) Maintenance.

**42. Legacy to Infant—Vesting at Twenty-one—Advancement Clause.**—A testatrix bequeathed a share in £3,000, part of her residuary estate, to an infant, directing that it should vest on his attaining the age of twenty-one. The will empowered the trustees to apply this share for the advancement "or otherwise for the benefit" of the infant, but contained no express power of maintenance.

**HELD**—following *Pett v. Fellows* ((1733) 1 Swans. 561, n.), as explained in *Leslie v. Leslie* ((1835) 11. & G. t. Sugden, 1), that the will contained sufficient evidence of the testatrix's intention to maintain to justify the trustees in applying the interest at 4 per cent. on the infant's share towards his maintenance.

**IN RE CHURCHILL, HISCOCK v. LODDER**, [1909] 2 Ch. 431; 101 L. T. 380; 53 Sol. Jo. 697—Warrington, J.

## (c) Miscellaneous.

**43. Heirlooms—Bequest of Chattels to go with Settled Land—Except Articles not Suitable for Heirlooms—Right of Selection on Trustees.**—A



## XXII. Directions to Trustees—Continued.

testator bequeathed all his furniture and effects and articles of household or personal use and ornament at his residence, except such articles as his trustees should not consider suitable to be retained as heirlooms, upon trust, to allow the same to be used by the person entitled to the possession of the settled land.

**HELD**—that the Court ought not to interfere with the decision of the trustees as to what articles were suitable to be retained as heirlooms.

IN RE SMITH BOSANQUET'S TRUSTS, 53 Sol. Jo. [430—Eve, J.]

### 44. Trustees Directed to Carry on Testator's Business—Sale by Themselves of Goods to the Business—Right to Retain for Own Benefit Profits made on such Sales—Express Declaration in Will.]

—A will contained a direction for the trustees thereof to carry on the testator's business for such a period not exceeding ten years from the date of his death as the trustees in their discretion should think expedient, with all the powers in that behalf of absolute owners. The will contained a declaration that the trustees might exercise or concur in exercising all powers and discretions thereby or by law given to them notwithstanding that they or any of them had a direct or other personal interest in the mode or result of exercising such power or discretion.

**HELD**—that the trustees were entitled to supply goods to the testator's business and to charge his estate the fair market prices thereof, and to retain for their own use and benefit the profits derived from such supply.

Decision of the Vice-Chancellor of the County Palatine of Lancaster affirmed.

IN RE SYKES, SYKES v. SYKES, [1909] 2 Ch. 241; [78 L. J. Ch. 609; 101 L. T. 1—C. A.]

### (d) Precatory Trusts.

**45. Intention—Charitable Trust—Scheme.]**—By her will the testatrix gave a legacy of £2,300 to R. By a codicil dated the same day as the will she declared as follows: "I wish R. to use £1,000, part of the legacy given to him by my above will, for the endowment in his own name of a cot [in a specified hospital] and to retain the balance of the said legacy for his own use and benefit." By a later codicil the testatrix declared: "I wish R., after endowing a cot as provided by the first codicil, to use the balance of the legacy given to him by my will for such charitable purposes as he shall in his absolute discretion think fit." After the testatrix's death, R. renounced and disclaimed the legacy.

**HELD**—that the legacy did not fall into residue, but that a charitable trust was created by the will and codicils, and that there must be a scheme to carry it out.

IN RE BURLEY, ALEXANDER v. BURLEY, [1909] [W. N. 253; 26 T. L. R. 127—Joyce, J.]

**46. Special Desire that Sums Bequeathed Should be Specifically Left to Charities—Absolute Gift—Cutting Down by Uncertain Words.]**—A will, after bequests to W., and to A. and

L., the testator's sisters, subject to a legacy to C., who was appointed with W. "co-executor and co-trustee for" A. and L., and after certain specific bequests, continued as follows: "I specially desire that the sums herewith bequeathed shall, with the exception of the £1,000 to C., be specifically left by the legates to such charitable institutions of a distinct and undoubted Protestant nature as my sisters may select and in such proportion as they may determine."

**HELD**—that where the words employed are sufficient in themselves to give the donee the whole property in the subject-matter of the gift, the interest of the donee is not cut down to a trust or life estate by the mere expression of a desire; and that in the present case property was given to A. and L. absolutely, and could not be taken away by words which were of a doubtful or uncertain meaning.

IN RE CONOLLY, CONOLLY v. CONOLLY, [1909] [W. N. 259—Joyce, J.]

## XXIII. CONVERSION.

See also PERPETUITIES, No. 1.

### (a) Leaseholds.

[No paragraphs in this vol. of the Digest.]

### (b) Power of Postponement.

**47. Share Vested in Possession—Right to demand Immediate Sale.]**—A testator devised and bequeathed his real and personal estate to trustees upon trust for sale and conversion, and, after investing a sufficient sum to provide for an annuity for his wife, upon trust to pay the income to his sons for life with remainders to their children. The will gave to the trustees a power to postpone sale and conversion as long as they should think proper, and during such postponement to make any proper outlay for the benefit of the estate, the net income to be applied as income. One of the testator's sons died leaving children, one of whom had assigned his interest, already vested, to a reversionary company. The latter now required the trustees to sell what remained unconverted of the real estate and to pay to them their share of the proceeds.

**HELD**—that the power to postpone sale and conversion continued until all the shares had vested in possession, and that, until then, one beneficiary with a vested share in possession could not call either for a conveyance of his undivided share in the unconverted realty nor require an immediate conversion of the whole real estate.

IN RE HORSNAILL, WOMERSLEY v. HORSNAILL, [1909] 1 Ch. 631; 78 L. J. Ch. 331; 100 L. T. 603—Eady, J.]

### (c) Tenant for Life and Remainderman.

**48. Wasting Securities—Unauthorised Securities—Power to Retain Investments—Rule in Howe v. Earl of Dartmouth (1802) 7 Ves. 137.]**—Where a will contains no trust for conversion but empowers trustees in their discretion either to sell the residuary personal estate or to retain it in

## XXIII. Conversion—Continued.

the same state of investment as at the testator's death, there is no distinction to be drawn between merely unauthorised securities and wasting securities, so that the rule in *Howe v. Earl of Dartmouth* does not apply, and the tenant for life is entitled to the income of unauthorised securities retained by the trustees both permanent and wasting.

IN RE NICHOLSON, *Eade v. Nicholson*, [1909]  
[2 Ch. 111; 78 L. J. Ch. 516; 100 L. T. 877—  
Warrington, J.]

## XXIV. PAYMENT OF DEBTS AND LEGACIES.

See also EXECUTORS, IV.

## (a) Abatement.

See No. 57, *infra*.

## (b) Apportionment.

[No paragraphs in this vol. of the Digest.]

## (c) Charge on Real Estate.

49. *Mortgage by Executor being also Residuary Legatee—Charge on Property for Legacy to Another—Rights of Legatee.*—A testator, who died in 1885, by his will left all his property to his four sons by his first wife, subject to a charge for a legacy in favour of his four sons by his second wife. The legacy remained unpaid. The four elder sons in 1890 deposited the title deeds of part of the property with a Bank as security for an advance, and, in 1899, they executed a formal mortgage of the property to the Bank. The Bank, if they had made an investigation of title, would have obtained cognisance of the will which created the charge. The mortgagors practised no concealment.

HELD—that as the four younger sons were legatees and not merely creditors, and as the Bank had constructive notice of the charge, the claim of the four younger sons must prevail over the mortgage of the Bank.

*Graham v. Drummond* ([1896] 1 Ch. 968; 65 L. J. Ch. 472; 74 L. T. 417; 44 W. R. 596; 12 T. L. R. 319—Romer, J.) distinguished.

THE BANK OF BOMBAY AND ANOTHER v. SULEMAN SOMJI AND OTHERS, L. R. 35 Ind. App. 130; 99 L. T. 532; 24 T. L. R. 840; 52 Sol. Jo. 727—P. C.

50. *Express Charge of Debts—Mixed Fund—Limitation Act, 1623* (21 Jac. 1, c. 16), s. 3—*Real Property Limitation Act, 1874* (37 & 38 Vict. c. 57), s. 8—*Land Transfer Act, 1897* (60 & 61 Vict. c. 65), s. 2, sub-s. 3.]—A testator by his will in 1897 devised and bequeathed to trustees all the real and personal estate to which he should be entitled at his death upon trust to sell and convert the same and out of the proceeds to pay his debts, funeral and testamentary expenses, and hold the residue in trust for certain persons for life, with remainder to their children. The testator then gave each of his executors a legacy of £100. The testator died in 1901, his only asset being a reversionary share of real estate. His will was proved in 1905, when this property fell

into possession, and the executors advertised for creditors. The only creditors claimed for payments made on behalf of the testator more than six and less than twelve years ago.

HELD—that the express charge of debts on real estate was not rendered futile by the Land Transfer Act, 1897, s. 2, sub-s. 3, but had the effect of extending the period for their recovery to twelve years under the Real Property Limitation Act, 1874, s. 8.

In re *Kempster*, *Kempster v. Kempster* ([1906] 1 Ch. 446; 75 L. J. Ch. 286; 94 L. T. 248; 54 W. R. 385—Kekewich, J.) applied.

HELD ALSO—that the real and personal estate being treated in the will as a mixed fund were as such clearly residuary, and that the legacies to the executors were charged on and payable out of such mixed fund, and consequently out of the real estate.

IN RE BALLS, *Trewby v. Balls*, [1909] 1 Ch. 791; 78 L. J. Ch. 341; 100 L. T. 780—  
Eady, J.

## (d) Exoneration of Mortgaged Property.

51. *Direction to Pay off Mortgage out of Proceeds of Sale of Blackacre—Balance to fall into Residue—Blackacre Insufficient—Locke King's Acts—Contrary Intention—Real Estate Charges Act, 1854* (17 & 18 Vict. c. 113), s. 1.]—A testator directed that any mortgages on realty specifically devised, including Whiteacre, should be satisfied out of the proceeds of the sale of Blackacre, the balance of which was to fall into his residuary estate. Blackacre failed to realise a sum sufficient to pay off a mortgage on Whiteacre.

HELD—that the testator had shown an intention to exonerate Whiteacre to the extent of the proceeds of Blackacre and no further, that as to the balance of the Whiteacre mortgage Locke King's Acts applied, as there did not appear any sufficient "contrary intention," and that the devisee of Whiteacre was not entitled to claim exoneration out of the general personal estate.

IN RE BIRCH, *Hunt v. Thorn*, [1909] 1 Ch. 787; 78 L. J. Ch. 385; 101 L. T. 101—  
Eady, J.

## (e) Interest on Legacies.

[No paragraphs in this vol. of the Digest.]

## XXV. SURVIVORSHIP.

[No paragraphs in this vol. of the Digest.]

## XXVI. EXERCISE OF POWER OF APPOINTMENT.

See POWERS.

## XXVII. ANNUITIES.

52. *Direction to Pay out of Income—Gift over "Subject to Aforesaid Annuities"—Charge on Corpus.*—W. H. devised and bequeathed all his residuary real and personal estate to G. H. upon trust for sale and conversion at his discretion and to hold the same if unsold or the proceeds of sale, upon trust to pay certain annuities. "Subject to the aforesaid annuities," the will directed "that the trustee or trustees

XXVII. **Annuities—Continued.**

shall hold the said moneys to arise and be received as aforesaid upon trust for and I give and bequeath the same to my said brother G. H., his executors, administrators, and assigns absolutely." G. H. having since died and the income of the estate having become insufficient for the payment of the annuities in full, the executors of G. H., who had acted as the trustees of the will of W. H., took out a summons to determine whether the annuities were a charge on the *corpus* or only upon the income for the time being of the real and personal estate of W. H.

HELD—that the general direction to pay annuities out of income, followed by a disposition of the estate subject to the annuities, charged the annuities upon the *corpus* of the estate.

Decision of Joyce, J. ([1909] 1 Ch. 485; 78 L. J. Ch. 305; 100 L. T. 263) reversed.

IN RE HOWARTH. HOWARTH *v.* MAKINSON.  
[1909] 2 Ch. 19; 78 L. J. Ch. 687; 100 L. T. 865; 53 Sol. Jo. 519—C. A.

XXVIII. **CHARITABLE BEQUESTS.**

See also Nos. 45, 46, *supra*; CHARITIES.

53. *Charitable Purposes—Uncertainty.*—A testator by his will gave the residue of his estate in the following terms:—"I desire that my executors, with the assistance of Mr. J. R. H., Mr. —, the art master, and any persons they may call in to assist them, shall expend the said residue in any manner they may think desirable to encourage artistic pursuits or assist needy students in art. And, finally, if any differences of opinion arise, then the decision of my executors shall be final and binding."

HELD—that it was not a good charitable gift.

IN RE OGDEN, TAYLOR *v.* SHARP, 25 T. L. R. [382—C. A.]

54. *Failure of Object after Testator's Death—Conditional Gift—Cy-près.*—A charitable bequest to a scheme for founding an institution, the gift being conditional on the foundation of the institution, which scheme after the legacy was paid over was abandoned, the moneys received by the trustees being returned to the donors, reverts to the testator's residuary estate, and does not fall to be administered by the Crown *cy-près*.

In re Slerin, Slerin *v.* Hepburn ([1891] 2 Ch. 236; 64 L. T. 311; 39 W. R. 578—C. A.) distinguished.

Decision of Joyce, J. affirmed.

IN RE THE TRUSTS OF THE UNIVERSITY OF LONDON MEDICAL SCIENCES INSTITUTE FUND, FOWLER *v.* ATTORNEY-GENERAL, [1909] 2 Ch. 1; 78 L. J. Ch. 562; 100 L. T. 423; 25 T. L. R. 358; 53 Sol. Jo. 302—C. A.

55. *Bequest to Named Institution—No Existing Institution Bearing Name—Charitable Intention—Application cy-près.*—The testator bequeathed part of his estate to certain institutions, the

objects of all of which were obviously charitable, and to the "Protestant Church Bible Society." No society of that name had ever existed.

HELD—that the Court had to look not merely at the name of the particular institution, but at the whole context to see whether a charitable gift was intended; that as the "Protestant Church Bible Society" was included in a list with other institutions, the objects of all of which were obviously charitable, it must be inferred that the testator meant a society whose objects were charitable, as the cheap distribution of Bibles would be; and, therefore, that, as the legacy failed, there must be an application of the bequest *cy-près*.

IN RE W. T. PARKES, COTTRELL *v.* PARKES,  
[25 T. L. R. 523—Warrington, J.]

56. *Bequest to Named Institution or to Charitable Work—Name of Fund Inaccurate at Date of Will—Named Fund Divided into Two—Intention.*—A testator, by his will, directed his trustees to invest the sum of £500 and pay the net annual income thereof "to the treasurer or treasurers for the time being of the Felton-cum-Framlington District Nurse Fund, to be applied by him or them for and in aid of the charitable work for which such fund has been raised," and he declared that "should the charitable work for which the said nurse fund has been instituted from any cause cease to be carried on for the space of two years" the said sum and income should fall into his residuary estate. The testator had been a subscriber for many years to a fund bearing the name mentioned, but some months before the date of his will the village of Framlington ceased to be connected with the fund, and started one of its own, while the village of Felton carried on its own work in its own name.

HELD—(1) that the will showed a general charitable intention, and not merely an intention to give a fund to a particular charitable institution; and (2) that the Felton-cum-Framlington fund had not ceased to exist but had been divided into two, and that the proper way of carrying out the testator's charitable intention would be to give four-fifths to Felton and the remaining one-fifth to Framlington, these being the proportions of population in the two villages respectively.

IN RE WILSON, DECEASED, WARDLE *v.* LEMON, 25 T. L. R. 465—Eady, J.

57. *Named Institutions—Trustees' Discretion—Deserving and in Need of Assistance—Trustee Residuary Legatee—Abatement if Legacies Paid in Full.*—A testatrix gave various charitable legacies and declared "the payment of the legacies to charitable institutions to be in the absolute discretion of my trustees and subject to their being satisfied that each of such institutions is deserving and in need of assistance." She gave other pecuniary legacies, and made one of her trustees her residuary legatee. The question for the Court was whether the trustees had an absolute power to refuse to pay any of the charitable legacies, whether wholly or in part, if they should think fit to do so. If all the



**XXVIII. Charitable Bequests—Continued.**

legacies were to be paid, there would have to be some abatement.

**HELD**—that the trustees had not an absolute power to refuse to pay the charitable legacies if they should think fit or on the ground that such payment would prevent the payment of the other pecuniary legacies, but that they could only refuse to pay in the case of an institution as to which they were not satisfied that it was deserving and in need of assistance.

**IN RE VANSTONE, HUME v. HUME, Times, June**  
[21st, 1909—Warrington, J.]

**58. Gift to Officer Commanding Regiment—“Setting out of Soldiers.”—Statute 43 Eliz. c. 4.]**

—A bequest to the officer commanding a regiment “for the mess of that regiment or for the poor of the regiment” is a good charitable bequest.

**IN RE DONALD, MOORE v. SOMERSET, [1909] 2**  
[Ch. 410; 78 L. J. Ch. 761; 101 L. T. 377; 53  
Sol. Jo. 673—Warrington, J.]

**XXIX. CONDITIONAL WILLS.**

[No paragraphs in this vol. of the Digest.]

**XXX. MUTUAL WILLS.**

[No paragraphs in this vol. of the Digest.]

**XXXI. CONFLICT OF LAWS.**

[No paragraphs in this vol. of the Digest.]

**XXXII. MISCELLANEOUS.****59. Refusal to Deliver up Will for Probate—**

**Subpœna—Motion for Attachment.]**—A motion for attachment of the respondent for refusing to deposit a will in his possession at a District Registry in obedience to a *subpœna* was ordered to stand over for further evidence that the will was in his possession. The respondent having attended to be examined, and producing the will, it was ordered that the will should be retained and that the respondent should pay the costs of the motion.

**IN RE FLOYD, DECEASED, 53 Sol. Jo. 790, 801—**  
[Neville, J.]

**60. Accumulations—Construction—Period of Accumulation—Share of Child.]**—A testator by his will left annuities to each of his children till they attained the age of twenty-five, and directed that for ten years after his death the surplus income of his estate should be allowed to accumulate, and “that as each child attains the age of twenty-five years his or her income from my estate is to be, during the ten-year period of accumulation, his or her proportionate part of ninety per cent. of the income of my estate after all charges are paid . . . it being my intention that my children are to share equally in such income, but until each child attains the age of twenty-five years what would have been his or her share is to accumulate and form part of my general estate . . . subject to the preceding provisions . . . the income of each year is to be divided between my children equally, share and share alike.”

**HELD**—that as each child attained twenty-five he or she was entitled to the prescribed share of the whole surplus income of the estate, and that the shares of children who had not yet attained twenty-five went to swell the total income, and could not be accumulated for their benefit till they became payable.

Decision of C. A. for Ontario, affirmed.

**FULFORD v. HARDY, [1909] A. C. 570; 101**  
[L. T. 357—P. C.]

**WINDING-UP.**

See BUILDING SOCIETIES; COMPANIES.

**WINDOWS.**

See EASEMENT.

**WITNESSES.**

See EVIDENCE.

**WOMEN, EMPLOYMENT OF.**

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“**Abutting on or adjoining.**”

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“**Accident.**”

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“**Act of law.**”

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“**Adapting for Sale.**”

See FACTORIES, No. 1.

“**Assigns.**”

See LANDLORD AND TENANT, No. 17.

“**Average weekly earnings.**”

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“**Bridge.**”

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“**Building.**”

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“**Building or structure.**”

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## "Capture."

*See* INSURANCE, No. 18.

## "Carcases."

*See* ANIMALS, No. 4.

## "Carriage."

*See* STREET TRAFFIC, No. 4.

## "Cash Value."

*See* DEATH DUTIES, No. 4.

## "Cause to be represented."

*See* COPYRIGHT, No. 3.

## "Ceased to exist."

*See* ROYAL FORCES, No. 3.

## "Charges."

*See* SHIPPING, No. 23.

## "Charitable."

*See* CHARITIES, Nos. 10 to 15.

## "Chartreuse."

*See* TRADE MARKS, No. 9.

## "Children."

*See* WILLS, No. 13.

## "Civil or religious purposes."

*See* CHARITIES, No. 13.

## "Clear Value."

*See* DEATH DUTIES, No. 3.

## "Company in the United Kingdom."

*See* TRUSTS AND TRUSTEES, No. 8.

## "Competent witness for defence."

*See* CRIMINAL LAW AND PROCEDURE,  
No. 13.

## "Completion of the contract or work."

*See* HIGHWAYS, No. 14.  
LIMITATION OF ACTIONS, No. 1.

## "Conspicuous part."

*See* HIGHWAYS, No. 26.

## "Contraband of war."

*See* INSURANCE, No. 17.

## "Council."

*See* CORPORATIONS, No. 1.  
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## "Creditor."

*See* COMPANIES, No. 48.

## "Crown or King's clog."

*See* REAL PROPERTY, No. 1.

## "Dependant."

*See* MASTER AND SERVANT, Nos. 21 to  
25.

## "Discharging."

*See* SHIPPING, No. 51.

## "Distinctive mark."

*See* TRADE MARKS, Nos. 1, 2, 3, 5, 6, 7.

## "Document."

*See* EVIDENCE, No. 8.

## "Domestic purposes."

*See* METROPOLIS, No. 16.

## "Double possibilities."

*See* PERPETUITIES, No. 2.

## "Drain."

*See* SEWERS, No. 2.

## "Duly paid."

*See* LANDLORD AND TENANT, No. 5.

## "Employment of a casual nature."

*See* MASTER AND SERVANT, No. 84.

## "Error in judgment."

*See* SHIPPING, No. 9.

## "Evidence, repute or otherwise."

*See* ELECTIONS, No. 6.

## "Exclusively or mainly."

*See* PATENTS, No. 15.

## "Execution."

*See* JUDGMENT, No. 1.

## "Express reference."

*See* POWERS, No. 1.

## "Extenuating circumstances."

*See* MAGISTRATES, No. 6.

## "Factory."

*See* FACTORIES, No. 1.

## "Fancy bread."

*See* FOOD AND DRUGS, No. 9.

## "Found a bed."

*See* CHARITIES, No. 9.

## "Freehold."

*See* SALE OF LAND, No. 13.

## "From time to time."

*See* COMPANIES, No. 33.

## "Fruit."

*See* RAILWAYS, No. 25.

## "Gaming."

*See* GAMING, No. 7.

## "Given for illegal consideration."

*See* GAMING, No. 2.

## "Habitual drunkard."

*See* INTOXICATING LIQUORS, No. 19.

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"Harsh and unconscionable."

*See* MONEY AND MONEY-LENDERS,  
No. 8.

"Holder of a conditional purchase."

*See* DEPENDENCIES, No. 3.

"House."

*See* TRADE, No. 4.

"House and effects."

*See* WILLS, No. 14.

"House refuse."

*See* METROPOLIS, No. 11.

"Inaccessible."

*See* SHIPPING AND NAVIGATION,  
No. 9.

"Indecency."

*See* CRIMINAL LAW, No. 67.

"Independent brake."

*See* STREET TRAFFIC, No. 10.

"In or abutting on or adjoining."

*See* LOCAL GOVERNMENT, No. 13.

"In regular turn."

*See* SHIPPING, No. 26.

"Interest in land."

*See* SALE OF GOODS, No. 2.

"Invitation to alight."

*See* NEGLIGENCE, No. 6.

"Irredeemable."

*See* COMPANIES, No. 6.

"Issue of loan capital."

*See* REVENUE, No. 5.

"Landlord."

*See* LANDLORD AND TENANT, No. 7.

"Light locomotives."

*See* STREET TRAFFIC, No. 3.

"Liquidated demand."

*See* PRACTICE, No. 3.

"Lloyd's surveyor."

*See* SHIPPING, No. 20.

"Long pull."

*See* INTOXICATING LIQUORS, No. 14.

"Maintain and keep efficient."

*See* EDUCATION, Nos. 3, 4, 5.

"Margarine."

*See* FOOD, Nos. 13, 14.

"Minerals."

*See* MINES, Nos. 4, 5, 6.

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"Miscarriage of justice."

*See* CRIMINAL LAW, No. 112.

"Misconduct."

*See* BANKRUPTCY, No. 6.

"Mooring."

*See* SHIPPING, No. 52.

"Musical work."

*See* COPYRIGHT, No. 6.

"My own brothers and sisters."

*See* WILLS, No. 21.

"Narrow channel."

*See* SHIPPING, Nos. 36, 38.

"Navigates."

*See* DEPENDENCIES, No. 19.

"Net."

*See* STOCK EXCHANGE, No. 2.

"New building."

*See* LOCAL GOVERNMENT, Nos. 11, 12.

"New street."

*See* HIGHWAYS, No. 24.

"Next practicable quarter sessions."

*See* POOR LAW, No. 11.

"Obstruction."

*See* SHIPPING, No. 10.

"Offensive trade."

*See* NUISANCE, No. 6.

"On demand."

*See* MORTGAGE, No. 2.

"Open and notorious evil liver."

*See* ECCLESIASTICAL LAW, No. 1.

"Ordinarily resident within jurisdiction."

*See* PRACTICE, No. 2.

"Orlwoola."

*See* TRADE MARKS, No. 8.

"Oswego."

*See* TRADE MARKS, No. 1.

"Out of and in the course of employment."

*See* MASTER AND SERVANT, I., 1 (k).

"Owner."

*See* METROPOLIS, No. 5.  
MINES, No. 1.  
RATES, No. 7.  
SHIPPING, No. 44.

"Pack of hounds."

*See* ANIMALS, Nos. 8, 9.

"Paid to and received by."

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## "Paraphernalia."

*See* HUSBAND AND WIFE, No. 10.

## "Particular building contract."

*See* HIGHWAYS, No. 13.

## "Perfection."

*See* TRADE MARKS, No. 7.

## "Person."

*See* GAMING, No. 12.

## "Pictures."

*See* WILLS, No. 15.

## "Piracy."

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## "Plate and plated articles."

*See* WILLS, No. 20.

## "Police force."

*See* LOCAL GOVERNMENT, No. 5.

## "Possibility upon a Possibility."

*See* PERPETUITIES, No. 2.

## "Preceding period of twelve months."

*See* CRIMINAL LAW, No. 61.

## "Preservation or inspection of property."

*See* PRACTICE, No. 33.

## "Primary security."

*See* REVENUE, No. 4.

## "Private use."

*See* TELEGRAPHS AND TELEPHONES,  
No. 1.

## "Proceeding."

*See* SHIPPING, No. 35.  
STREET TRAFFIC, No. 4.

## "Prospectus."

*See* COMPANIES, No. 30.

## "Public highway."

*See* HIGHWAYS, No. 17.

## "Purchase."

*See* SALE OF GOODS, No. 1.

## "Railway."

*See* RAILWAYS, No. 5.  
RATES, No. 3.

## "Railway company."

*See* RAILWAYS, No. 17.

## "Ready for loading."

*See* SHIPPING, No. 12.

## "Ready money in hand."

*See* WILLS, No. 23.

## "Reasonable precautions."

*See* SHIPPING, No. 24.

## "Received in Great Britain."

*See* INCOME TAX, No. 5.

## "Recently taken."

*See* ANIMALS, No. 14.

## "Redeemable."

*See* COMPANIES, No. 6.

## "Registered capital."

*See* REVENUE, No. 6.

## "Rent reasonably to be expected."

*See* RATES, No. 12.

## "Repute."

*See* ELECTIONS, No. 6.

## "Royal."

*See* TRADE MARKS, No. 2.

## "Same description of goods."

*See* TRADE MARKS, No. 4.

## "Seaman."

*See* MASTER AND SERVANT, No. 97.

## "Series of debentures."

*See* COMPANIES, No. 13.

## "Servant."

*See* CRIMINAL LAW, No. 48.  
MASTER AND SERVANT, Nos. 101,  
102.

## "Setting out of Soldiers."

*See* WILLS, No. 58.

## "Settlement."

*See* REVENUE, No. 10.

## "Sewers."

*See* SEWERS, Nos. 1, 4.  
WATERS, No. 4.

## "Sharps."

*See* AGRICULTURE, No. 2.

## "Single private drain."

*See* SEWERS, No. 2.

## "Six-day licence."

*See* INTOXICATING LIQUORS, No. 12.

## "Skimmed milk."

*See* FOOD AND DRUGS No. 4.

## "Slip on."

*See* TRADE MARKS, No. 5.

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<b>Digby v. Financial News, Ltd.</b> ([1907] 1 K. B. 502; 23 T. L. R. 117—C. A.) approved.		<b>Elementary Education Acts, 1870 and 1873, In re, Ex parte Baxter</b> ([1908] 2 Ch. 503; 72 J. P. 445; 99 L. T. 467; 24 T. L. R. 808; 52 Sol. Jo. 681—Joyce, J.) affirmed . . . . .	92
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<b>Doughty v. Bowman</b> (1848) 11 Q. B. 444) discussed.		<b>Emslie v. Paterson</b> (1896) 24 R. (Ct. of Sess.) 77) approved and followed.	
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<b>Feltham's Trusts, In re</b> (1 K. & J. 528) considered and applied.		<b>Goatley v. Jones</b> .	269
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<b>Forrest and Others v. Merry and Cunningham</b> (1908) 45 Sc. L. R. 290 reversed .	419	<b>Goodlad v. Burnett</b> (1855) 1 K. & Y. 341 followed.	
<b>Forster v. Elvet Colliery Co.</b> ([1908] 1 K. B. 629; 77 L. J. K. B. 521; 98 L. T. 736; 24 T. L. R. 265; 52 Sol. Jo. 224—C. A.) affirmed, <i>sub nom.</i>		<b>In re Gillins; Inglis v. Gillins</b> .	654
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<b>G.</b>		<b>Great Eastern Ry. Co. v. Lord's Trustee</b> ([1908] 2 K. B. 54; 77 L. J. K. B. 611; 98 L. T. 910; 24 T. L. R. 470; 52 Sol. Jo. 394; 15 Manson, 107) reversed .	47, 55
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<b>Great Western Ry. Co. v. Carpalla United China Clay Co., Ltd.</b> (77 L. J. Ch. 673; 72 J. P. 157; 24 T. L. R. 801; 52 Sol. J. 683; [1908] W. N. 178—Eve, J.) affirmed . . . . . 420	<b>Harrogate Estates, Ltd., <i>In re</i></b> ([1903] 1 Ch. 498; 72 L. J. Ch. 313; 88 L. T. 82; 51 W. R. 331; 19 T. L. R. 246; 10 Manson, 113—Buckley, J.) applied. <i>Cunard Steamship Co. v. Hopwood</i> . . . . . 72
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<b>Gresham Life Assurance Society v. Bishop</b> ([1902] A. C. 287) followed. <i>Scottish Widows' Fund Life Assurance Society v. Inland Revenue</i> . . . . . 285	<b>Hay's Trustees v. Baillie</b> ([1908] S. C. 1224; 45 Sc. L. R. 908) followed. <i>Paterson's Trustees v. Paterson</i> . . . . . 61
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H.	<b>Higgins v. Searle</b> (72 J. P. 449—Lawrance, J.) reversed . . . . . 17
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<b>McLean and Wife v. Moss Bay Iron and Steel Co., Ltd.</b> ([1909] 2 K. B. 521; 78 L. J. K. B. 849; 10 L. T. 871; 25 T. L. R. 633—C. A.) applied.	<b>Midland Ry. Co. v. Great Western Ry. Co.</b> ([1908] 2 Ch. 644; 77 L. J. Ch. 820; 99 L. T. 676; 13 Rly. Cas. 347) affirmed . . . 499, 608
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<i>Williams v. Thomas</i> . . . 186	<i>In re Paddon; Staincliffe v. Adlam</i> . 552
<b>Martin v. M'Taggart</b> ([1906] 2 I. R. 120; 40 I. L. T. 12) considered and not approved.	<b>Moore, In re</b> ([1901] 1 Ch. 691; 70 L. J. Ch. 321; 49 W. R. 373) followed.
<i>Toppin v. Belfast Corporation</i> . . 463	<i>In re Hadley; Johnson v. Hadley</i> . 156
<b>Martin v. Martin &amp; Co.</b> ([1897] 1 Q. B. 429; 66 L. J. Q. B. 241; 76 L. T. 44; 45 W. R. 260—C. A.) distinguished.	<b>Morgan v. Elvet Colliery Co.</b> ([1908] 1 K. B. 629; 77 L. J. K. B. 521; 98 L. T. 736; 24 T. L. R. 265; 52 Sol. Jo. 224—C. A.) affirmed <i>sub nom.</i>
<i>Lee v. Arthur</i> . . . 484	<i>Dyson v. Forster; Dyson v. Seed, Quinn, Morgan and Others</i> . . 419
<b>Mason v. Grigg</b> (decision of Bucknill, J.) reversed . . . 589, 590	<b>Morgan's Case</b> ((1884) 28 Ch. D. 620; 54 L. J. Ch. 765; 51 L. T. 623; 33 W. R. 209—Bacon, V.-C.) applied.
<b>Maw v. Jones</b> ((1890) 25 Q. B. D. 107; 59 L. J. Q. B. 542; 63 L. T. 347; 54 J. P. 727; 38 W. R. 718—C. A.) discussed.	<i>In re British Building Stone Co., Ltd.</i> . 80
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<b>Mears v. Western Canada Pulp and Paper Co.</b> ([1905] 2 Ch. 353; 74 L. J. Ch. 353; 93 L. T. 150; 21 T. L. R. 599; 12 Manson, 295—C. A.) applied.	<i>Donaldson Bros. v. Cowan</i> . . . 370
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<b>Metropolitan District Ry. Co. and Cosh, In re</b> ((1880) 13 Ch. D. 607; 49 L. J. Ch. 277; 42 L. T. 73; 44 J. P. 393; 28 W. R. 685) cited.	<i>Dean and Another v. Brown.</i> . . 114
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	<b>Nash, In re; Cook v. Frederick</b> ([1909] 2 Ch. 450; 78 L. J. Ch. 657; 101 L. T. 153; 25 T. L. R. 688; 53 Sol. Jo. 651—Eve, J.) affirmed . 460, 473, 549, 657

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	COL.		COL.
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<b>National Telephone Co. v. Inland Revenue Commissioners</b> ([1900] A. C. 1; 69 L. J. Q. B. 43; 81 L. T. 546; 64 J. P. 420; 48 W. R. 210; 16 T. L. R. 58—H. L.) followed.		<i>In re Weighell</i> . . . . .	33
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<b>Norman, <i>In re</i></b> ((1886) 16 Q. B. D. 673; 55 L. J. Q. B. 202; 54 L. T. 143; 34 W. R. 313—C. A.) followed.		<i>In re Macfadyen (P.); Ex parte Vizianagaram Mining Co., Ltd.</i> 34, 35	
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<b>North British Ry. Co. v. Budhill Coal and Sandstone Co.</b> ([1909] S. C. 277; 46 Sc. L. R. 178) reversed	420	<i>Chisholm v. Walker &amp; Co.</i> . . . . .	393
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<b>Oliver's Settlement</b> ([1905] 1 Ch. 191—Farwell, J.) approved.		<b>Pearce v. Bullard, King &amp; Co.</b> , ([1908] 1 Ch. 780; 77 L. J. Ch. 340; 98 L. T. 527; 24 T. L. R. 353; 52 Sol. Jo. 301; 15 Manson, 88) overruled.	
<i>In re Nash; Cook v. Frederick</i> . . . . .	657	<i>In re Pearce's Trusts</i> . . . . .	35
<b>O'Neill v. Johnston</b> ([1909] 1 I. R. 237—C. A.) affirmed . . . . .	639	<b>Pearce's Trusts, <i>In re</i></b> (decision of Warrington, J.) reversed . . . . .	35
<b>Orlebar, <i>In re</i></b> ([1908] 1 Ch. 136; 77 L. J. Ch. 54; 98 L. T. 19; 24 T. L. R. 42) followed.		<b>Pearth v. Marriott</b> ((1882) 22 Ch. D. 182; 52 L. J. Ch. 221; 48 L. T. 170; 31 W. R. 68—C. A.) followed.	
<i>In re Hadley; Johnson v. Hadley</i> . . . . .	156	<i>Badar Bee v. Habib Merican Noordin, sub nom. Tengachee Nachar v. Habib Merican Noordin and Others</i> 177	
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<b>Osborne v. Amalgamated Society of Railway Servants</b> ((1908) 77 L. J. Ch. 759; 24 T. L. R. 827—Neville, J.) reversed	616	<b>Peterson, <i>In re</i></b> ([1909] W. N. 149; 53 Sol. Jo. 617—Eve, J.) affirmed	589
<b>Osborne v. Amalgamated Society of Railway Servants</b> ((1909) 128 L. T. Jo. 170; <i>Times</i> , Dec. 22nd—H. L.) affirmed	616	<b>Pett v. Fellows</b> ((1733) 1 Swans. 561, n.) cited.	
<b>Osborne v. Bradley</b> ([1903] 2 Ch. 446; 89 L. T. R. 11) distinguished.		<i>In re Churchill; Hiscock v. Lodder</i> . . . . .	662
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<b>Owen v. Faversham Corporation</b> (72 J. P. 404—Eve, J.) affirmed . . . . .	226	<i>Leslie v. Leslie</i> . . . . .	662
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<b>Palmer v. Mallett</b> ((1887) 3 Ch. D. 411—C. A.) explained and followed.		<b>Portal and Lamb, <i>In re</i></b> ((1885) 30 Ch. D. 50) explained.	
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<b>Postmaster-General v. National Telephone Co., Ltd.</b> ([1908] 2 Ch. 172; 77 L. J. Ch. 707; 72 J. P. 307; 24 T. L. R. 665—(C. A.) reversed . . . . .	606	<b>R. v. Deaville</b> ([1903] 1 K. B. 468; 72 L. J. K. B. 272; 67 J. P. 82; 51 W. R. 604; 88 L. T. 32; 19 T. L. R. 223; 20 Cox, C. C. 389) explained and distinguished.	
<b>Poulton v. Adjustable Cover and Boiler Block Co.</b> (77 L. J. Ch. 586; 24 T. L. R. 717; 25 R. P. C. 529—Parker, J.) affirmed . . . . .	205, 454, 455	<i>Buxton and Another v. Scott</i> . . . . .	240
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<b>Price's Patent Candle Co., Ltd. v. London County Council</b> (72 J. P. 315; 24 T. L. R. 607—Neville, J.) affirmed . . . . .	413	<b>R. v. Fisher</b> ((1889) <i>Times</i> , Jan. 31st) dissented from.	
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		<b>R. v. Hamilton</b> ((1908) 72 J. P. N. C. 365) considered.	
		<i>R. v. Smith; R. v. Wilson</i> . . . . .	144
		<b>R. v. Income Tax Special Commissioners; Ex parte University College of North Wales</b> (72 J. P. 195; 98 L. T. 446; 24 T. L. R. 491; 52 Sol. Jo. 395; [1908] W. N. 92—Div. Ct.) affirmed . . . . .	284
		<b>R. v. Jones</b> (1 Den. 551; 19 L. J. M. C. 162; 4 Cox, C. C. 198—C. C. R.) followed.	
		<i>R. v. Stoddart</i> . . . . .	123
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Title Butterworths' ten years' digest; yearly digest of reported cases for the year 1909; ed. by Hill & Clover.

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